The
Ceylon Law Weekly

containing Cases decided by the Court of Criminal Appeal, the Supreme Court of Ceylon, and His Majesty the Queen in the Privy Council on appeal from the Supreme Court of Ceylon, and Foreign Judgments of local interest.

VOLUME XLVII

WITH A DIGEST

H. H. BASNAYAKE, Q.C.
(Consulting Editor)

G. P. J. KURUKULASURIYA,
Advocate of the Supreme Court
(Editor)

B. P. PEIRIS, LL.B. (LOND.) | B. SENARATH DIAS, B.A. (LOND.)
C. CHELLAPPAH, B. A. (LOND.) | H. B. WHITE, B.A. (LOND.)
M. H. M. NAINA MARIKAR, B.A. LL.B. (CANTAB.)
Advocates of the Supreme Court
(Asst. Editors)

1952

Subscription payable in advance. Rs. 7/50 per Volume.

CORRIGENDUM

Pages 6 and 9.—Reference to Rex *vs.* Colclough (1882) 1 N.L.R. 129 should be read as 1 N.Z.L.R. 129.

Page 7.—2nd Column, para 1, line 29. "In the first occasion" should be read as "on the first occasion".

Page 8.—1st Column para 2, line 10. "On the very first day" should be read as "on the very next day".

INDEX OF NAMES

Action

For declaration of title—Plea of *jus tertii* by defendant— Third party's claim dismissed in previous action—Does it operate as a bar to defendants' plea.

See Res Judicata 12

Administrator

Administrator and heir in possession for over ten years of property of deceased *qua* administrator—Refusal to acknowledge rights of some co-heirs—Administrator's failure to divest himself of his representative character—Can he acquire prescriptive rights to such interests —Administrator's right to acquire prescriptive right as against some co-heirs—Fiduciary character of administrator's office—Is he an express trustee.

See Prescription 75

Agency

See under Principal and Agent.

Amendment

Cause of action—Amendment of pleadings—Hire of elephant—Contract—Death of elephant due to negligence of defendant—Is it a tort?—Scope of action—Civil Procedure Code, Sections 40 (*d*) *and* 45.

The plaintiff, who sued the defendant for damages in connection with the hire of an elephant stated in his plaint that the contract was entered into within the jurisdiction of the Court, and after referring to the date and nature of the contract claimed damages on the ground that the elephant died owing to the negligence of the defendant. He sought to amend the plaint in order to make it clear that his claim was based on contract. The learned District Judge disallowed the amendment on the ground that the plaintiff was seeking to alter the scope of his original action which was based on a tort to one based on a contract. The plaintiff appealed.

Held : That the original plaint was based on contract and the mere mention of negligence in the plaint did not convert it into one of tort and as such the amendment should have been allowed.

MUNASINGHA *vs.* L. C. DE SILVA 63

Appeal

Mixed question of fact and law—cannot be raised for the first time in appeal.

See Principal and Agent 17

When may Appeal Cot interfere with finding of trial Court.

See Contract 53

Attorney-General

Power of—To give directions in respect of trials held by Magistrate in respect of non-summary offences.

See Criminal Procedure 1

Betting on Horse Racing Ordinance

Betting—Charge of—Section 10, *Betting and Horse Racing Ordinance—What must be proved under section* 3—*Decoy going back on evidence—Availability of other evidence—Can conviction be sustained?*

Where the accused was charged under section 10 of the Betting and Horse Racing Ordinance for receiving or negotiating a bet on a horse race and there was evidence to establish that betting on horse racing was going on at the premises and that the accused received the betting slips and negotiated the illegal bet.

Held : (1) That the accused was rightly convicted.

(2) That it is sufficient to prove that a bet was received on a horse race proposed to be run and that it is not necessary to prove that the horses on which the bet is taken actually ran.

(3) That where a decoy goes back on his evidence the Court can convict an accused person provided there is other evidence to establish the charge beyond reasonable doubt.

(4) That where the offence is committed in a place other than the place authorized under the search warrant, the presumption of guilt under the Ordinance is not available and the prosecution must prove the offence in the ordinary way.

Per CHOKSY, A.J.—" That a Judge of the lower Court has not set out all the reasons that may be urged for rejecting a defence does not necessarily mean that he has not considered the defence. So long as the Appeal Court is satisfied that the defence has been examined and that its rejection has not been on grounds that cannot be justified, it cannot be said that the elementary principles of natural justice have not been observed ".

KONSTZ *vs.* SUB-INSPECTOR THARMARAJAH ... 58

Buddhist Law

Temple—Plaintiff incumbent thereof—Requisition by the military—Demolition of temple—De-requisition—Partial restoration of temple by plaintiff—Claim by plaintiff to have himself declared incumbent —Objection on the ground temple non-existent—meaning of temple—Section 2, *Buddhist Temporalities Ordinance.*

The plaintiff, who was the lawful incumbent of a long established temple, which had been demolished by the military authorities on requisition so as to render it unfit for use as a place of worship, sought to have himself declared the lawful incumbent. After the premises were handed back by the military, the incumbent and other priests began the work of restoring the temple by first erecting a temporary *avasa* and an image.

The defendant opposed the plaintiff's claim on the ground that the temple had so completely lost its identity and character as to be a " temple " within the meaning of section 2, Buddhist Temporalities Ordinance.

Held : That in the circumstances there was no loss either of the identity of the temple or the status of the incumbent who clearly intended to restore the *status quo* as soon as it was practicable to do so.

Per GRATIAEN, J.—" If it be the duty of an incumbent to keep the vihare and the other appurtenances of his temple in good order and repair and presumably to take the necessary steps to procure the restoration of any buildings that have been destroyed by some outside agency, I cannot see why even the complete demolition of a " temple "

must necessarily operate to divest the incumbent of his office.

GUNARATNE THERO *vs.* NAYAKE THERO ... 95

Ceylon (Constitution) Order in Council

Ceylon (Constitution) Order in Council 1946, *section* 14 (2)—*Action under, by common informer to recover penalty for sitting and voting in House of Representatives having reasonable grounds for knowing disqualification—Plaintiff's application to proceed with action—District Judge's discretion to allow or withhold—Proviso to sub-section* (2)—*When may Supreme Court interfere with such discretion.*

The District Judge, purporting to exercise discretion under the proviso to sub-section (2) of section 14 of the Ceylon (Constitution) Order in Council 1946 refused to give leave to the plaintiff, a common informer, to proceed with his action filed under section 14 (2) of the said Order in Council for recovering Rs. 83,000 by way of a penalty from the defendant for sitting and voting in the House of Representatives, having reasonable grounds for knowing that he was disqualified from doing so.

This refusal was based on the ground that a similar action on the same facts, covering a different period of time brought by another plaintiff in the same Court had been dismissed earlier for want of appearance.

Held : That the public interest requires that actions of this nature should have the opportunity of being decided on their merits, and as the earlier action was dismissed without a consideration of the merits, the learned District Judge should have granted leave to the plaintiff to proceed with the action.

EGRIS *vs.* HAMID USEEN MARIKAR SEGI ISMAIL 108

Civil Procedure Code

Section 9—Does it apply only to persons domiciled in Ceylon.

See Jurisdiction 51

Section 69—Service of summons out of the Island duly effected—Action for breach of promise of marriage—Defendant residing outside Ceylon—Has the Court jurisdiction to hear the case.

See Jurisdiction 51

Section 349—*Certificate of payment—Proctor's right to certify on behalf of Decree-Holder.*

Held : That certification of payment under section 349 of the Civil Procedure Code does not involve an appearance in Court on the part of the decree-holder, and the proviso to section 24 of the Civil Procedure Code does not apply. The written consent of the decree-holder is not necessary where a proctor representing him moves the Court to certify payment.

SOPIN NONA PATHMASILLIE *vs.* R. DON JORLIS RAJAPAKSE 64

Section 540—Duration of the status of an administrator in relation to property which he has taken over in the exercise of his powers of administration.

See Prescription 75

Collation

Collation—Gift by father to son on the occasion of son's marriage—Mortgage by son—Sale in execution of mortgage—Purchase by plaintiff—Death of father —Administration of his estate—Order in administration proceedings that the value of gifted property was Rs. 6,000 *and it must be brought into collation—Does this order amount to a declaration of title in favour of estate—Has S the option to bring the property or paying its value—Matrimonial Rights and Inheritance Ordinance* (*Cap.* 47) *section* 36—*Was Roman Dutch Law superseded by this enactment.*

P gifted a property in 1927 to his son S who mortgaged it in 1944. In execution of the mortgage decree against the property was sold and purchased by the plaintiff who obtained Fiscal's conveyance in 1950 and sued the defendant for declaration of title and ejectment.

P died in 1936 and in proceedings relating to the administration of his estate it was decided by the District Court, Kandy, in 1941 (later upheld by the Supreme Court and the Privy Council) that this property had been gifted to S on the occasion of his marriage and that its value was Rs. 6,000 and that it must be brought into collation.

The defendant, the administrator of P's estate, claims that the order of Court was in effect a declaration of title in favour of the estate and that S was divested of his title thereby and the defendant as administrator was in lawful possession.

The District Judge accepted this view and dismissed plaintiff's action.

Held : (1) That the decision that the property must be brought into collation did not have the effect either of declaring that P's estate was entitled to it or of divesting S of his title under the deed of gift.

(2) That section 36 of the Matrimonial Rights and Inheritance Ordinance (Cap. 47) did not supersede the Roman-Dutch Law which permits an heir to discharge a liability to collation by surrendering the property gifted or paying its true value at his option.

JAINUDEEN *vs.* MURUGIAH 81

Compensation for Improvements

Landlord though not actual owner consenting to improvements by tenant—Owner conveying premises let to another—Attornment and payment of rent to purchaser—Claim for compensation for improvements by tenant against landlord at the time of improvements—Who is liable for the claim.

See Landlord and Tenant 19

Contract

Government official contracting with plaintiff's agent in Ceylon to indent goods from foreign country on commission—Order executed and goods accepted though not consigned to official as agreed—Action by plaintiff as undisclosed principal against Crown for balance due—Privity of contract.

See Principal and Agent 17

Contract—Appellant employed by respondent on a fixed salary—Oral agreement for payment of commission—Finding of Trial Court—When may Appellate Court interfere ?—Meaning of "share of profits", "commission", bonus'—Evidence Ordinance, sections 34, 37.

The appellant who was employed by the respondent on a fixed salary alleged that he was promised

a commission on the net profits of the business for each year; certain sums of money described as " commission " " bonus " had been credited to the appellant in the books of the respondent.

The trial Judge found for the appellant on his claim to a commission based largely on his estimate of the credibility of the appellant and the respondent respectively.

The Supreme Court set aside the order of the trial Judge on the ground of misdirection in that the finding was based on his disbelief of the respondent by reason of ' respondents ' contradictions, and that those contradictions in their view amounted to nothing more than an incapacity to explain or remember certain facts.

Held : (1) That the order of the Supreme Court should be set aside as their Lordship's find it impossible to agree with the reasons given by the Supreme Court, as in their Lordship's view the judgment of the trial Judge indicates that his acceptance of the appellant's story was based largely on his impression of the demeanour of the appellant.

(2) That objection cannot be taken at the Privy Council to evidence admitted at the trial and in the Court of Appeal.

The terms "share of profits" and "commission" are expressions relating to a legal right, while " bonus " refers generally to an ex-gratia payment.

MOHAMED AKBAR ABDUL SATHAR *vs.* W. L. BOGSTRA *et al* 53

Corroboration

Of dying deposition—Is it necessary.

See Court of Criminal Appeal 101

Court of Criminal Appeal

Court of Criminal Appeal—Defence counsel's undue attack on credibility of prosecution witness—Comment by trial Judge on counsel's conduct in his summing-up—Does it cause prejudice.

Where in a trial for murder the trial Judge expressed the view in his summing up to the jury, that the defence Counsel, in attacking the credibility of the main witness for the prosecution, had exceeded the bounds of decent advocacy and it was urged in appeal that the jury might have been unduly influenced by the strong views of the Judge on the improper conduct of the counsel.

Held : That in the circumstances of this case, the Judge was merely giving strong expression to his own opinion of the witness' credibility and of the criticisms of the defence Counsel, and had made it clear to the jury that they were not bound by his opinion.

Per GRATIAEN, J.—" If, in this connection, the lawyer for the defence is so unwise, in the course of his final speech to the jury, as to make statements of fact unfavourable to a witness which are not borne out by the evidence in the case, we do not doubt that it is the duty of the presiding Judge in his summing-up to remove the effect of such improper statements. This process might well involve some criticism of the conduct of the lawyer concerned.

REX *vs.* (1) KIRIWANTHIE (2) MALHAMY ... 31

Court of Criminal Appeal—Dying deposition—Must there be corroboration—Judge's duty to caution jury—Evidence Ordinance, section 32 (1)*—Accused's failure to give evidence—Adverse comment of Judge—No misdirection in the circumstances of the case.*

Where in a trial for murder by stabbing, the accused was convicted on the dying deposition of the deceased as to the circumstances of the transaction, which resulted in his death, and it was contended in appeal that there was misdirection by the Trial Judge on two grounds : firstly, that the learned Judge failed to caution the jury adequately upon the danger of acting on the uncorroborated deposition of the deceased and secondly, that the trial judge had observed that the accused had not given evidence, although in view of the nature of the prosecution case, the accused could have given the jury an account of a sudden fight or of grave and sudden provocation which caused him to lose his self control and stab the deceased and that consequently this comment might have led the jury to infer wrongly that the accused was the deceased's assailant.

Held : (1) That there was on the established facts of the case ample corroboration of the deceased's deposition and that the jury were adequately cautioned as regards the inherent weakness of evidence of this kind.

(2) That the view adopted in *In re Guruswami Tevar* A.I.R. 1940 Madras at page 200 is preferable to the view expressed in *Emperor vs. Akbarali Karimbahai* 1933 A.I.R. Bombay 479 *

(3) That the comment of the trial Judge on the failure of the accused to give evidence did not amount to a misdirection as (*a*) the jury had been directed that the burden of proof on the accused would arise only if the jury were satisfied that the deceased's assailant was the accused and (*b*) that jury had been directed that the onus of proof was on the prosecution to establish the identity of the assailant and the fact that the appellant did not give evidence did not help the prosecution to discharge the obligation.

REX *vs.* B. FRANCIS FERNANDO *alias* LEWIS FERNANDO 101

Court of Criminal Appeal—Murder—Evidence led in rebuttal by the Crown after close of prosecution case—Such evidence available to the Crown before close of case—Evidence allowed in the interest of justice and to impeach credibility of accused—Was it proper—Judge's exercise of discretion under section 237 (1) *Criminal Procedure Code—Principles governing it—Burden of proof where accident is pleaded—Section* 73, *Penal Code.*

In a charge of murder by shooting with a gun the presiding Judge allowed the Crown to lead in rebuttal evidence of facts constituting a motive for the alleged murder after the prosecution had closed its case and the accused had given evidence. This was done for the purpose of impeaching the credibility of the accused and in the interest of justice. The evidence led in rebuttal was available to the Crown before it closed its case.

The presiding Judge also in referring to the appellant's evidence that the gun was discharged accidently told the jury that the burden was on the accused to satisfy them, that the accused's version was probably true.

Held : (1) That there has been a miscarriage of justice resulting from a wrong exercise of discretion by the presiding Judge to allow the prosecution to call in evidence in rebuttal.

(2) That the prosecution should not have been permitted to adduce at that stage evidence which, if it was admissible at all, could have been adduced before the appellant entered upon his defence ; for

the prosecution was thereby enabled to withhold until after the close of the case for the defence an important part of its own case, consisting of the whole of the evidence of a motive and a part of the evidence of the preparation for the commission of the offence charged.

(3) That the onus was on the prosecution to prove beyond reasonable doubt that the firing of the gun was not accidental and the appellant would have been entitled to an acquittal even if it was not proved that the injury was the result of an accident but there was a reasonable doubt on that point.

REX *vs.* V. THURAISAMY 105

Criminal Law

Indictment—Offences of conspiracy and of abetment to commit criminal breach of trust—Joinder of charges—Multiplicity of—Prejudice—Sections 113*b*, 391 *Penal Code—Sections* 168 (2), 180 (2) *Criminal Procedure Code.*

Four persons were indicted on several counts, the first count being that they agreed to commit or abet or agreed together with a common purpose for or in committing or abetting criminal breach of trust of money being the property of the National Bank of India, Ltd., Nuwara Eliya and that they did thereby commit an offence punishable under section 391 read with section 113B of the Penal Code.

Counsel objected to the charge on the ground that the count put together four different conspiracies to commit criminal breach of trust of money, and in so far as it referred to abetment it was bad for vagueness and for want of particulars.

Counsel objected to joining in one and the same indictment counts 7 and 8 as these counts alleged commission of an offence separate and distinct from the conspiracy charged in count 1.

Counsel also objected to count 3 in that it sought to charge all the accused with having abetted the second accused in regard to criminal breach of trust of gross sum between two terminal dates. Instead the prosecution should have selected any three items and charged the accused with having abetted the offence of criminal breach of trust in respect of those three specific items only and not more.

Held : (1) That the objection to count 1 must be over-ruled on the ground that the Crown alleged one single conspiracy between all the accused in which they put their heads together and agreed to act with one single common purpose of design, namely, to misappropriate the money of the Bank and that it was not possible antecedently to allocate to each separate accused a definite part to play.

(2) That the objection to counts 7 and 8 and 3 cannot be sustained as there was a single conspiracy in furtherance of which at different stages the first, third and fourth accused abetted the second accused in the misappropriation and that at other stages the first accused furthered the common objective of misappropriation by falsifying the documents.

(3) That it is permissible under the provisions of section 180 (2) of the Criminal Procedure Code to join charges in one and the same indictment where the same facts constitute the offences of conspiracy under section 113B and also of abetment under section 102 of the Penal Code.

(4) That count 3 adequately sets out the mode of abetment coupled with section 100 of the Penal Code.

Per CHOKSY, A.J.—The principle that seems to emerge from that case is that once there is a charge of conspiracy to commit a certain specified offence all the accused can be charged not only for that conspiracy but also for the various criminal offences committed by the different conspirators individually, or abetted by some of them and committed by others of them, even though all the conspirators may not have been aware of or being party to the various individual offences of their co-conspirators, so long as those offences were committed or abetted in pursuance of that same conspiracy.

REX *vs.* KANAGARATNAM *et al* 42

Criminal Procedure

Mandamus—Criminal Procedure—Commencement of proceedings under chapter 18*—Assumption of summary jurisdiction by Magistrate under section* 152 (3) *Criminal Procedure Code—Pleas of accused recorded—Attorney-General's order to Magistrate to discontinue summary proceedings and to take non-summary proceedings—Validity of—Section* 390 (2) *of Criminal Procedure Code—Scope of.*

Held : That the power of the Attorney-General under section 390 (2) of the Criminal Procedure Code to give instructions to a Magistrate is limited to non-summary inquiries under Chapter XVI of the Criminal Procedure Code and does not extend to trials either of summary offences or of non-summary offences in respect of which the Magistrate may have assumed jurisdiction under section 152 (3) of the Criminal Procedure Code.

Per GRATIAEN, J.—" In England, a Magistrate is expressly precluded from assuming, without the express consent of the Director of Public Prosecutions, summary jurisdiction to try indictable offences in cases in which the Director has taken over the conduct of the prosecution. In this country, however, the Attorney-General enjoys no such power of veto. In my opinion, it is very desirable that the provisions of section 152 (3) of the Criminal Procedure Code should be amended in this as well as in certain other respects ".

THE ATTORNEY-GENERAL *vs.* SRI SKANDARAJAH 1

Criminal Procedure Code

Section 390 (2)—Scope of.
See Criminal Procedure 1

Section 180 (2)—It is permissible to join charges in one and the same indictment where the same facts constitute the offences of conspiracy under section 113B and also of abetment under section 102 of the Penal Code.
See Criminal Law 42

Section 237 (1)—Judges exercise of discretion under—Principles governing it.
See Court of Criminal Appeal 105

Decoy

Decoy going back on evidence—Availability of other evidence—Can conviction be sustained.
See Betting on Horse Racing Ordinance ... 58

Deed

Deed—Rectification of—Transfer of undivided shares of whole land—Parties intention to deal with divided interests of specific portion of whole land—Mistake—Courts power to give relief—Equitable principles—Evidence Ordinance, section 92, proviso (1).

Held : By GUNASEKARA, J. and CHOKSY, A.J. (NAGALINGAM, A.C.J. dissenting). Where deeds conveyed undivided shares of the whole land, when in fact the parties to the deed intended to deal with shares of a divided portion of that land, resulting in a misdescription of the property that was dealt with, the Court guided by principles of justice, equity, and good conscience, has the power to rectify the mutual mistake of the parties and give effect to their real intention.

(2) That the Court has power to grant this relief even though the plea of mistake and a claim for rectification had not been set up in the suit.

(3) That the case of *Jayaratne vs. Ranapura* (1951) 52 N.L.R. 499 was correctly decided.

GIRIGORIS PERERA *vs.* ROSALINE PERERA ... 65

Discretion

District Judge's discretion to allow or withhold application—When may Supreme Court interfere with such discretion.

See Ceylon (Constitution) Order in Council ... 108

Donation

Deed conveying property absolutely subject to prohibition against sale or mortgage—Does it create a *fidei commissum.*

See Fidei commisdum 14

Donation—Subsequent birth of illegitimate child to donor—Child legitimated by marriage later—Action by donor four years after to have gift annulled and cancelled—Is the action prescribed—Prescription Ordinance, (Cap. 55) sections 6 and 10.

Held : (1) That the right to have a gift revoked on the ground of the subsequent birth of a child is based on a cause of action " not expressly provided for " in the Prescription Ordinance and therefore comes within the ambit of section 10 of the Ordinance and becomes prescribed within three years from the time when the cause of action has accrued.

(2) That in such a case the cause of action arises as soon the child is born.

Per GRATIAEN, J.—" Section 6 of the Prescription Ordinance does not apply for the simple reason that the cause of action involves no " breach " of any obligation by the donee, for it would be facetious indeed to impute any " blame " to him for the happy event which had taken place in the donor's household. In fact, no obligation to restore the property could arise unless and until a decree for cancellation had been pronounced. The decisions of this Court in *Govt. Agent, Western Province vs. Pallaniappa Chetty* (1908) 11 N.L.R. 151 and *Ponnamperuwa vs. Gunasekere* (1921) 23 N.L.R. 235 are distinguishable because they were concerned only with deeds of gift which expressly empowered the donor to revoke the gift *by his own act* and without the intervention of the Court. In such an event, the donee's repudiation of the right of revocation would clearly have constituted a " breach " of the contract giving rise to a cause of action contemplated by section 6.

APPUHAMY *vs.* MARY NONA AND ANOTHER ... 46

Dying Deposition

Must there be corroboration of a dying deposition.

See Court of Criminal Appeal 101

Elections

An Election to Municipal Office cannot be questioned by a Councillor who has concurred in the Election.

See Municipal Councils Ordinance 5

Estate Duty

Estate Duty—Hindu undivided family—Property left by manager of such family—Exempt from Estate Duty—Sections 29, 34, 40, 43, 73—Amending Ordinance No. 76 of 1938 and No. 8 of 1941.

Where the managing member of a Hindu undivided family domiciled in S. India and carrying on business in Ceylon purports by his last will to dispose of the assets of the business on the footing that he was the absolute owner thereof, and the Commissioner of Estate Duty assessed the Estate on the footing that it belonged to the deceased in his individual capacity, and not to the undivided family, and the widow as executrix of the said last will contended that it belonged to the undivided family, and consequently not assessable, and where it was argued that as a matter of procedural law no new evidence could be led before the District Court in an appeal against the Commissioner's order.

Held : (1) That as the evidence clearly established that the estate belonged to the joint family and that the deceased did not die possessed of it as separate estate, it is property falling within the provisions of section 73 of the Estate Duty Ordimamce, and consequently no sum was payable in respect of it as Estate Duty.

(2) That in an appeal to the District Court under section 34 of the Estate Duty Ordinance, the appeal is not limited to the question whether the Commissioner had misdirected himself on the evidence before him, and under section 40 of the Ordinance the appellant has the right to lead evidence when he comes before the District Court to contest the validity of an order of assessment approved by the Commissioner.

ATTORNEY-GENERAL *vs.* VALLIYAMMAI ATCHI ... 88

Estoppel

Person taking part and concurring in irregular election—Can he later question validity of election.

See Municipal Councils Ordinance 5

Evidence

Decoy going back on evidence—Availability of other evidence—Can conviction be sustained.

See Betting on Horse Racing Ordinance ... 58

Evidence in rebuttal led by Crown after close of prosecution case—Regularity.

See Court of Criminal Appeal 105

Evidence Ordinance

Section 92—Mutual mistake—Parties expressing in deed an intention different from their actual intention—Admissibility of evidence of such mistake.

See Deed 65

Section 32—Dying deposition—Must it be corroborated.

See Court of Criminal Appeal 101

Fidei commissum

Donation—Deed conveying property absolutely subject to prohibition against sale or mortgage—Fidei commissum.

Where by deed a donor conveyed property to donee, her heirs, executors, administrators and assignes by "*way of a gift absolute and irrevocable* ....." provided that the donee should not sell or mortgage the property except to the donor's children mentioned in the deed.

Held : That the deed did not create a *fidei commissum* and that the donor intended to pass to the donee full rights of ownership in the property.

PATHIRANA *et al vs.* GUNAWARDHENA ... 14

Fidei commissum—*Plaintiff's claim to property under a clause of last will—Clause alleged to create* fidei commissum *binding four generations—Last will with three subsequent codicils admitted to probate—Contents of codicils not proved by plaintiff—Principles of construction of a will creating* fidei commissum—Jus accrescendi.

The plaintiff claimed title to a share in a property which the defendant and his predecessors had possessed *ut dominus* for over half a century. He based his claim on the provisions of a clause in the last will of one Saviel Dias dated 30th August, 1807, which, he submitted, created in respect of the property "a valid *fidei commissum* in perpetual succession binding on (the immediate devisees) and their descendants to the fourth degree of succession", thereby defeating defendant's prescriptive title. In the testamentary proceedings of Saviel Dias' estate in 1811, the last will together with three subsequent codicils had been admitted to probate, but in the present action only the third codicil (the other two codicils being missing) was produced without a translation for the limited purpose of identifying the will.

Clause 21 of the will is as follows :—

> "The testator bequeaths *beforehand* to his three children (name) and likewise to the two children of the testator's deceased daughter Louisa Dias, named Francisca Waniappu and Louisa Wanniappu.....(the property is here described).....*with the wish that not only must the said portion of the garden and the paddy field remain unsold in order that all his abovementioned children and grandchildren might enjoy the profits therefrom, to wit :* a quarter each by the three first named ones and one quarter by the two last named ones or one-eighth of the whole by each of the two, *but also if one of the said children or grandchildren of the testator should happen to die without leaving lawful descendants behind, then his or her share must devolve to the testator's other children and grandchildren who are alive.*"

On behalf of the plaintiff it was submitted (*a*) that the testamentary direction that the property must "remain unsold" amounted in this context to a real (as opposed to a personal) prohibition against alienation, indicating an intention that the property should never pass out of the family of the immediate devisees and their lawful descendants, and (*b*) that in accordance with the principles laid down by the Privy Council in *Tillekeratne vs. Abeyasekere* (2 N.L.R. 313) there was a single bequest to five persons of a property which was intended, not expressly but by necessary implication to be burdened with a *fidei commissum* in favour of a successive series of their descendants.

On behalf of the defendant it was admitted (*a*) that the will does not represent the complete testamentary instrument because the plaintiff's failure to prove the contents of the codicils made it impossible for a Court of law to decide that Saviel Dias' final testamentary disposition of the property was exclusively contained in the provisions of Clause 21 of the will; (*b*) that in any event Clause 21 did not create a valid *fidei commissum* and certainly not a multiplex *fidei commissum.*

Held : (1) That in the absence of proof by the plaintiff of the contents of the codicils admitted to probate, it cannot be concluded that Clause 21 substantially expresses the final testamentary intentions of Saviel Dias as to the devolution of the property, and therefore the plaintiff's claim fails *ab initio.*

(2) That Clause 21 did not create a valid *fidei commissum* and that the testator intended the appropriate shares in the property to vest absolutely, and without further restriction, in each institute (or his substitute, as the case may be).

(3) That the words "wish", "remain unsold", in Clause 21 either by themselves or in relation to the rest of the language do not afford convincing evidence of an underlying intention to conserve the property perpetually for the benefit of succeeding generations of the family concerned. On the contrary the primary object of the prohibition is expressly to ensure the enjoyment of the profits by the five persons named as devisees and *no one else.*

(4) That the principle of *jus accrescendi* does not apply because there is a clear disposition by the testator of a specific share to each of the named institutes indicating very clearly a *separation of interests* which immediately raises a presumption against accrual.

(5) That even if it be legitimate to interpret the words under consideration as creating a *fidei commissum* the will unequivocally provides for one grade of *fidei commissaries.* Clause 21 does not create "a recurring or multiplex *fidei commissum* circulating as it were throughout the family.

THE ARCHBISHOP OF COLOMBO *vs.* DON ALEXANDER 26

Hindu Law

Hindu undivided family—Property left by manager of such family—Liability to estate duty.

See Estate Duty 88

Hindu Temple

Officiating priest of Hindu Temple claiming declaration to office on prescriptive right and hereditary right—Can such right be acquired by prescription.

See Prescription Ordinance 61

Hotchpot

See under Collation.

Ignorantia Legis Neminem Excusat

See Municipal Councils Ordinance 5

Income Tax

Income Tax—Oral contract of employment understood to be four-year contract with six month's leave on full pay—Money set aside as leave pay paid to executrix on death of employee—Is such payment a profit under section 6 (2) (a) (i) or 6 (2) (a) (v) of Income Tax Ordinance (Chapter 188) as amended by section 3 of Income Tax Amendment Ordinance No. 25 of 1939?—Construction, a matter of law not of evidence—Section 73 (7) (4) of Income Tax Ordinance.

The respondent's husband, Mr. Sutherland, was employed by a company on an oral contract for a period of four years with six months' leave on full pay, and the passage money to be paid by the company for him and his wife. The company paid to the respondent as executrix a sum of money as leave pay which Mr. Sutherland would have been entitled to if he had survived. It was the normal practice of the company to pay leave pay in proportion to the length of service which has elapsed without leave.

The Commissioner of Income Tax sought to assess the amount on the footing that this sum was a profit of the deceased's employment under section 6 (2) (a) (i) or 6 (2) (a) (v) of the Income Tax Ordinance (Chapter 188) as amended by section 3 of the Income Tax Amendment Ordinance No. 25 of 1939. The respondent's contention was that the amount was paid to her personally as a gratuitous payment and not *qua executrix* as a profit of employment due to her husband's estate.

The company in their correspondence expressed contradictory opinion about the character of the sum in question.

Held: (1) That the contract between Mr. Sutherland and the company was a contract for four years' service with six months' leave on full pay and there was no basis for a claim by Mr. Sutherland's executrix for pay in lieu of off leave on his death without having had leave.

(2) That there was no justification for implying a term by which the company would be bound to pay leave pay when no leave was taken, where the normal practice of the company in so doing was not expressly incorporated.

(3) That the payment was made *ex gratia* and not in discharge of a contractual obligation and therefore could not be assessed under section 6 (2) of the Income Tax Ordinance.

(4) That though opinions of the company about the intendment of the contract may have been received under section 73 (7) of the Income Tax Ordinance they are irrelevant and are not in law admissible as aids to the construction of the contract.

(5) That the language of section 73 (7) is very wide but it does not go so far as to authorize the Board of Review to ignore the rule that construction is a matter of law and not of evidence.

THE COMMISSIONER OF INCOME TAX COLOMBO *vs.* MR. A. J. SUTHERLAND 84

Income Tax—Appellant Company's returns rejected and differently assessed by Income Tax Authorities—Assessment based on data available to the authorities—Objection to assessment as being arbitrary and violating secrecy under section 4 (1) of Income Tax—Authorities powers to assess—Scope of —Income Tax Ordinance (Chapter 188)—Sections 69, 64, (2) 70, 71, 73 (4) 86 (2).

The appellant, a bus company, submitted returns of Income Tax for 4 years, which the assessor rejected and assessed at substantially larger sums, as the margin of profits according to the tendered accounts was smaller than they should have been according to the assessor. The Commissioner reduced the assessments of the assessor, and in so doing the Commissioner relied upon data which supported the view that the profits of a bus company in the area the appellant was operating bore a fairly constant ratio to the company's expenditure on oil and petrol. The data contained in a document R 14 related to the expenditure of seven other bus companies, whose names were not given and were extracted from files in the Income Tax Department, which were not available for inspection by the appellant.

The Commissioner's assessment was confirmed by the Board of Review and by the Supreme Court.

It was contended by the appellant that (a) that there was no evidence or material on which the Board could justifiably reject the appellant's accounts; (b) that the document R 14 was wrongly admitted at the hearing by the Commissioner of Income Tax, and that the document infringed the duty of secrecy enjoined under section 4 (1) of the Income Tax and consequently invalidated the Commissioner's assessment; (c) that the Commissioner in making his order did act on material which was not properly in evidence at the hearing of the Appeal by him.

Held: (1) That the Income Tax authorities had the power under the Ordinance to reject the appellant's returns and substitute their estimates of the assessable income and that it was not necessary for them to give reasons for so doing.

(2) That before the Board of Review the onus was on the appellant to disprove the correctness of the estimates and to establish some lower figure, which the appellant had failed to do.

(3) That the reliance on the data contained in document R 14 as showing a ratio between net profit and expenditure on oil and petrol was legitimate for the purpose of calculating the appellant's proper assessment and did not infringe the principles of fair play and natural justice.

(4) That the reception of document R 14 did not violate section 4 (1) of the Income Tax as it contained no name except that of the appellant and the data contained thereon were extracted anonymously, and that it was unnecessary to decide whether, if it was infringed, this would in itself invalidate the assessment.

GAMINI BUS CO., LTD. *vs.* THE COMMISSIONER OF INCOME TAX 109

Indian and Pakistani Residents (Citizenship) Act

Indian and Pakistani Residents (Citizenship) Act No. 3 of 1949, section 6 (2) (ii)—Interpretation of the words "Ordinarily resident"—Section 22—Applicant for registration—Does the minimum period of uninterrupted residence required for the husband have any application to his wife and children.

Held : That a married man, permanently settled in Ceylon, can be registered as a citizen under the Indian and Pakistani Residents (Citizen) Act No. 3 of 1949, although his wife, though ordinarily resident in Ceylon at the date of his application, had not been so resident for the seven years prior to 1st January, 1946 (as required by section 3), and though his minor children have not been ordinarily resident in Ceylon during the whole period of their dependency on him.

Indictment

Offences of conspiracy and of abetment to commit criminal breach of trust—Joinder of charges—Multiplicity of charges—Prejudice.

Charge of falsification of accounts under section 467 of Penal Code—Can it be joined with charges of criminal breach of trust under section 392A of the Code.

Insurance

For Motor Car Insurance.

See under Motor Car Ordinance No. 54 of 1938.

Judge

Judge commenting in his summing-up on defence Counsel's conduct in unduly attacking the credibility of prosecution witness—Does it cause prejudice.

Trial Judge's findings based largely on his impression of the demeanour of parties—When may Appellate Court interfere.

Trial Judge not setting out all the reasons that may be urged for rejecting a defence—Does not necessarily mean that he has not considered the defence.

Jurisdiction

Jurisdiction—Defendant residing outside Ceylon —Service of summons out of island duly effected— Action for breach of promise of marriage—Section 9, Civil Procedure Code—Does it apply only to persons domiciled in Ceylon?—Civil Procedure Code, sections 9, 69.

The plaintiff-appellant sued the defendant-respondent to recover damages for breach of promise of marriage. Service of summons on the defendant-respondent, who had been residing outside Ceylon, was duly effected, in accordance with the provisions of section 69 of the Civil Procedure Code.

A preliminary issue was raised as to whether the Court had jurisdiction to hear the case, as the defendant was living outside Ceylon, and this was decided in favour of the defendant.

The plaintiff appealed, and the appeal was argued on the basis that, if the matter was justiciable in Ceylon at all, the Kandy District Court was the appropriate Court.

Held : (1) That there was no good cause for accepting the respondent's contention that section 9 (Civil Procedure Code) applied only to persons domiciled in Ceylon.

(2) That, in consequence, the matter was justiciable in Ceylon.

Per ROSE, C.J.—Moreover in a comparatively recent case in *re Liddell's Settlement Trusts* (1936) 1 Ch. Div. 365, Romer, L.J., has said, at page 374, in considering the effect of Order X1 Rule 1 (*c*) (of the United Kingdom Supreme Court).

" The moment a person is properly served under the provisions of Order X1 that person, so far as the *jurisdiction of this Court is concerned*, is precisely in the same position as a person who is in this country."

Jus Accrescendi

Jus Tertii

Action for declaration of title—Plea of *jus tertii* by defendant—Third parties claim dismissed in previous action—Does it operate as a bar to defendant's plea.

Landlord and Tenant

(*See also under Rent Restriction Act*).

Landlord and tenant—Landlord though not actual owner consenting to or acquiescing in improvements by tenant—Owner conveying premises let to another— Attornment and payment of rent to purchaser— Claim for compensation for improvements by tenant against landlord at the time of improvements—Who is liable for the claim.

The 1st defendant let to the plaintiffs as landlord certain premises, owned by his mother, acting to all intents and purposes as the owner thereof. He consented to, or at least acquiesced in improvements effected by the plaintiffs on the footing that he was the owner of the premises let. The improvements resulted in an increase of the Municipal assessment and accordingly the landlord was benefited by way of an enhanced rental. Subsequent to the improvements and at the request of the 1st defendant, the plaintiffs attorned to the 2nd defendant to whom the 1st defendant's mother had conveyed her title.

Plaintiffs claimed compensation for improvements from the 1st and 2nd defendants jointly and severally. At the trial the 2nd defendant, who had in turn disposed of his interests to a third party, was dismissed from the action by consent of parties and the case proceeded against the 1st defendant. The plaintiffs succeeded in the District Court and the 1st defendant appealed.

It was argued for the appellant that it was the actual owner of the premises at the date of the termination of the tenancy and vacation of the premises by the tenant, who is liable to pay com-

pensation and not the landlord who consented to or acquiesced in the improvements.

Held: (1) That the plaintiffs were right in making their claim against the 1st defendant as the actual owner had nothing to do with the plaintiffs and none of them were bound by any agreement expressed or implied between the plaintiffs and the 1st defendant.

(2) That a lessee or tenant cannot claim compensation for improvements effected with the consent or acquiescence of the landlord from a person who does not claim through the landlord but independently of him.

(3) That the plaintiffs are entitled to their claim as upon their attornment to the 2nd defendant, the tenancy that existed between them and the 1st defendant terminated.

Per CHOKSY, A.J.—" Despite the variety of facts and circumstances in the cases I have referred to, the principle that appears to emerge from them is that a lessee or tenant cannot claim compensation for improvements effected with the consent or acquiescence of the landlord from a person who does not claim through the landlord but independently of him ".

ALLES *vs.* KRISHNAM AND ANOTHER 19

Mandamus

Commencement of proceedings under Chapter 18 of Criminal Procedure Code—Assumption of summary jurisdiction by Magistrate—Pleas of accused recorded—Attorney-General's order to Magistrate to discontinue summary proceedings and to take non-summary proceedings—Validity of.

See Criminal Procedure 1

Mandamus—Irregular election—Person questioning the election taking part and concurring therein.

See Municipal Councils Ordinance 5

Matrimonial Rights and Inheritance Ordinance

Section 36—Was Roman-Dutch Law superseded by this enactment.

See Collation 81

Minor

Minor, property of—Sale sanctioned by Court after due inquiry—Conclusion of sale by execution of notarial conveyance—Subsequent offer of higher price by prospective purchaser—Can Court set aside such concluded sale.

Held: That where the sale of a minor's property was sanctioned by Court after due and proper inquiry, the mere fact, that some prospective purchaser subsequently turns up, who is willing to pay a higher price for the property, cannot justify the Court in repudiating a concluded sale which has taken place on terms expressly sanctioned by the Court.

MEERA LEBBE *vs.* PIYADASA *et al* 82

Mistake

Court's power to give relief—Equitable principles

See Deed 65

Mortgage

Sale of land subject to usufructuary mortgage—Subsequent sale to another—Prior registration of later deed—Possession by vendee on earlier deed after discharging of mortgage—Possession of usufructuary mortgagee—To whose benefit does it enure—Prescription.

See Registration of Documents Ordinance ... 97

Motor Car Ordinance No. 54 of 1938

Insurance—Third party risk—What is sufficient and adequate notice of action to the insurer?—Should the particular forum be expressly stated in such notice?—Sections 133 *and* 134. *Motor Car Ordinance No.* 54 *of* 1938.

A person who had been injured in a car accident wrote a letter to the Insurance Company, with which the car that had caused the accident was insured, stating that he intended filing action against the insured for the recovery of damages caused to him by the accident. The letter further stated the number of the car and that it had been insured with the Company, the date of the accident, the amount of damages and also alleged negligence on the part of the insured.

Held: That the notice as given in the letter sufficiently complied with the requirements of section 133 of the Motor Car Ordinance No. 54 of 1938 and the forum where the action was to be filed was not necessary.

CEYLON MOTOR INSURANCE ASSOCIATION LTD. *vs.* THAMBUGALA 9

Municipal Councils Ordinance No. 29 of 1947

Quo warranto *and* mandamus—*Application for—Election of Mayor, Galle Municipal Council—Three candidates—Withdrawal of one candidate after voting commences—Voting resulting in seven votes for petitioner, and six for first respondent—Second voting held thereafter resulting in eight votes for first respondent and seven for petitioner—First respondent declared Mayor—Was second voting, and election of first respondent valid?—Meaning of the term " candidate " in section* 14 (4), *Municipal Council's Ordinance, No.* 29 *of* 1947, *as amended by the Local Authorities (Election of Officials) Act, No.* 39 *of* 1951—*Irregularity in mode of election—Effect of petitioner's innocent participation—Plea of ignorance of the Law—Is petitioner estopped from impeaching election?—Section* 14, *Municipal Council's Ordinance, No.* 29 *of* 1947, *as amended by the Local Authorities Act No.* 39 *of* 1951.

The petitioner and the first respondent were candidates for election as Mayor of the Galle Municipal Council at a meeting of the Council held for that purpose. The second respondent was the Chairman of that meeting.

At the meeting in question, the names of three Councillors—The petitioner the first respondent and N. were duly proposed and seconded for election. After three councillors had exercised their rights of voting N. withdrew from the contest, and the second respondent continued with the taking of the votes. In the result seven councillors voted for the petitioner, six for the first respondent and two declined to vote. The second respondent thereafter purported to hold a second voting which resulted in eight councillors voting for the first respondent, and seven for the petitioner. The second respondent thereupon declared the first respondent elected Mayor.

The petitioner contended that the second voting and the purported election of the first respondent were a nullity, and that having received more votes than the aggregate of the votes received by the first respondent and N. at the first voting, he was duly elected Mayor in accordance with the provisions of section 14 of the Municipal Council's Ordinance, No. 29 of 1947, as amended by the Local Authorities (Election of Officials) Act No. 39 of 1951.

Held : (1) That despite the fact that the provisions of section 14 (4) of the Municipal Council's Ordinance 29 of 1947, as amended by the Local Authorities (Election of Officials) Act No. 39 of 1952, were infringed, the inadvertent participation of the petitioner in the irregularity, and his concurrence thereto, disqualified him from impeaching the first respondent's title to the office.

(2) That the petitioner's plea that he was " not aware that the said further proceedings were void " was only a plea of ignorance of the law, which is not an excuse.

Per GUNASEKARA, J.—I agree with this view. The word " candidate " in the context in which it appears means no more, I think, than a Councillor who has consented to his name being proposed and seconded for election.

Penal Code

Section 392 A.

Misjoinder of charges—Public Officer entrusted with money—Shortage of money so entrusted—Charges of criminal breach of trust under section 392 A of Penal Code—Can a charge of falsification of accounts under section 467 of Penal Code be joined—Legality of such joinder—Criminal Procedure Code, section 168—Burden of proving charge under section 392 A.

Held : (1) That upon a charge under section 392A of the Penal Code, the burden rests on the prosecution to prove the ingredients of the offence of criminal breach of trust as defined in section 388 of the Penal Code, and that burden so far as the element of dishonesty is concerned, is *prima facie* discharged by the failure on the part of the public officer to produce the money shown in the accounts kept by him or to account therefor.

(2) That a finding of dishonesty on the evidence taken as a whole being a pre-requisite to a conviction under the section, the joinder of a count in the same indictment for making false entries with intent to defraud by concealing misappropriation is not illegal, as the falsification is so intimately connected with the misappropriation, as to form a single transaction.

Section 73—Burden of proof where accident is pleaded.

Plaint

Plaint based on contract—Mere mention of negligence in the plaint does not convert it into one of tort.

Pleadings

Amendment of—See under Amendment.

Prescription Ordinance

Right to have a gift revoked on the ground of the subsequent birth of a child comes within the ambit of section 10 of the Ordinance and becomes prescribed within three years from the time when the cause of action has accrued.

Prescription—Plaintiff, officiating priest of Hindu Temple—Plaintiff's claim for declaration to office on prescriptive right and hereditary right—Roman Dutch Law—What rights can be acquired by prescription.

Plaintiff claimed that he was entitled to be declared the hereditary officiating priest of Nagapooshani Amman Temple on the ground (1) that he had acquired prescriptive title by reason of undisturbed and uninterrupted possession of a 2/9 share of the priestly office for over ten years, and (2) that he had a hereditary right.

Held : (1) That under our law acquisition by prescription is confined to rights in immovable property and there is no acquisitive prescription either to movables or choses in action or even to a right to an office.

(2) That the history and practice of the temple establish that the right to officiate as priests in the temple was hereditary and the plaintiff was therefore entitled to officiate as priest and receive " the traditional perquisites " of the office.

Prescription—Acquisition of rights by—Administrator and heir in possession for over ten years of property of deceased qua administrator—Refusal to acknowledge rights of some co-heirs—Administrator's failure to divest himself of his representative character—Can he acquire prescriptive rights to such interests—Administrator's right to acquire prescriptive right as against some co-heirs—Fiduciary character of Administrator's office—Is he an express trustee?—Section 111 of the Trusts Ordinance.

D. B. a married Muslim lady died intestate in 1926 leaving her husband (the 1st defendant) and two infant children (2nd and 3rd defendants). It is not contested that according to Muslim law the deceased's parents also became her intestate heirs in addition to her husband and children. D. B.'s father himself died intestate shortly afterwards leaving his widow (4th defendant) and his three sons (the plaintiff and the 5th and 6th defendants) who succeeded to his interests in D. B.'s estate, which was duly admitted to administration and letters of administration were issued to her husband the 1st defendant, and the property, the subject matter of the action was correctly inventorised and the 1st defendant entered into possession thereof as administrator.

The plaintiff instituted this action to partition the property and 1st defendant disputed the rights of the plaintiff and the 4th, 5th and 6th defendants. The learned District Judge after hearing evidence dismissed the plaintiff's action on the ground that he and 4th, 5th and 6th defendants had lost their

rights by virtue of the provisions of section 3 of the Prescription Ordinance. The District Judge also held that the 1st defendant as administrator and as an heir of D. B.'s estate had consistently and unequivocally refused to acknowledge her parent's claims to heirship and had since about the year 1930 possessed the property on behalf of himself and his minor children on the footing that the property belonged exclusively to them.

The plaintiff appealed—

Held : (1) That in the absence of evidence to establish that the 1st defendant had divested himself of the representative character in which he first he entered upon the land in such a manner as the law would consider sufficient to relieve him of the fiduciary obligations attaching to his office, he cannot be held to have converted his possession *qua* administrator into possession *ut dominus* to enable him to acquire a prescriptive right against the other co-heirs to whom he stood in a position of fiduciary relationship.

(2) That the duration of the status of an administrator in relation to property which he has taken over in the exercise of his powers of administration and which he still retains in his hands is indicated in the provisions of sections 540 of the Civil Procedure Code. His office endures until the death of the administrator or the completion of the administration whichever first occurs.

(3) That whenever an administrator enters in that capacity upon property belonging to a deceased's estate, the law requires him to act in a fiduciary relation in regard to it, and a Court of Equity imposes upon him all the liabilities of an express trustee and will call him an express trustee of an express trust and section III of the Trusts Ordinance becomes applicable.

(4) An administrator in possession of property belonging to the estate owes an equal duty by virtue of his office to all the intestate heirs without discrimination and so long as that fiduciary relationship subsists, the law will not permit him to say that he held the property for the benefit of only those to whom he was bound by special ties of kinship or affection.

Principal and Agent

Principal and Agent—Government official contracting with plaintiff's agent in Ceylon to indent goods from foreign country on commission—Order executed and goods accepted though not consigned to the official as agreed—Action by plaintiff as undisclosed principal against Crown for balance due—Privity of contract—Plaintiff's right to sue—Mixed question of fact and law—Can it be raised for first time in appeal.

The Government of Ceylon through the Commissioner of Co-operative Development placed an order with a local firm of indenting agents for certain goods to be imported from a foreign country. It was agreed *inter alia* (*a*) that the shipment be consigned to the Commissioner, (*b*) that commission as usual at 4 per cent. was payable to the indenting firm by the Commissioner. The order was executed and the goods were accepted by the Commissioner though the shipment was not consigned to the Commissioner as agreed. The Commissioner was aware and it was clear from the terms of the contract that the goods were indented from certain undisclosed principal. Plaintiff as undisclosed principal sued the Attorney-General for a balance sum due on the contract.

Held : (1) That the plaintiff is entitled to maintain this action for the recovery of his claim.

(2) That an undisclosed principal can sue upon a contract made by an agent on his behalf.

(3) That a mixed question of law and fact could not be raised in appeal for the first time.

Privy Council

Proctor and Client

Proctor and client—Appellant induced to lend money on inadequate security—Material circumstances relating to inducement not fully disclosed by respondent, appellant's proctor—Action by appellant against respondent for loss on the ground of breach of duty—Duty of proctor to client—Nature of—Principles governing fiduciary relationship.

The appellant sought to invest a sum of money on a mortgage through the respondent, his proctor, who had negotiated such investments previously for him. He was induced to loan the money to one Samaratunga on a primary mortgage of his " Panwila " property and a secondary mortgage of his " Fincham's Land ", on statements made by the respondent's brother Samsudeen, an " unlicensed broker " as to the nature of the security and the integrity of the borrower, which were false, but which Samsudeen represented to the appellant as having been endorsed by the respondent.

At the time of the loan there was a hypothecary decree for Rs. 4,900 in respect of the Panwila property in favour of the respondent's cousin Naina Marikar and Fincham's Land was subject to a primary bond in favour of Moolchand for nearly Rs. 44,500 and to a secondary bond for Rs. 6,000 in favour of respondent's brother Samsudeen and respondent's wife. Out of the sum of Rs. 15,000 lent by appellant to Samaratunga Rs. 4,500 was paid to respondent's cousin Naina Marikar and Rs. 6,000 to respondent's brother and wife. In an action to recover the loan, the appellant ultimately was able to realize only a sum of Rs. 2,250 from Samaratunga.

The appellant alleged in his plaint that the respondent, acting as his legal adviser, had recommended an unprofitable investment introduced by Samsudeen and that his conduct constituted a breach of his professional duty arising under the contract of employment ; in particular that the respondent had acted fraudulently and with dishonest intention of furthering the interests of his own relatives—information regarding which interest he had improperly withheld from the appellant at the time of the transaction.

The respondent denied the allegation and pleaded that he had at all times expressly told the appellant that he should satisfy himself about the value and

adequacy of the security and with which the appellant in fact was satisfied.

The learned District Judge dismissed the appellant's action on the ground that the respondent had not fraudulently concealed material facts within his knowledge with a view to inducing the appellant to make the investment, and that the respondent had sufficiently complied with his duty by informing the appellant of the existence only of the subsisting mortgages on Fincham's Land and the Panwila property respectively (without disclosing the identity of the mortgagees), and that it made no difference to the appellant whether secondary mortgage was in favour of Samsudeen and the respondent's wife or in favour of some other parties.

The evidence in the case established that the respondent did not disclose to the appellant the extent to which his relatives stood to gain if the transaction went through; that he did not sufficiently advise the appellant as to the safe margin which should be insisted on if the main security for the loan was to be a secondary mortgage of Fincham's Land, having regard to the proved unreliability and financial weakness of the borrower and to appellant's known inability to purchase the property himself at a forced sale; that he did not sufficiently refute the recommendation of the borrower with which Samsudeen had deliberately associated him.

Held: (1) That the respondent's conduct in the transaction fell far short of the duty imposed on him by contract and also of "the duty of particular obligation imposed on him" by his special fiduciary relationship because he refrained from communicating to his client many circumstances within his knowledge which were material to his client's decision and consequently the appellant must succeed in his claim.

(2) That in a transaction arising from a fiduciary relationship of a special nature, such as where a proctor is invited to act professionally for a client which would benefit materially either the proctor or his close relatives, it is not necessary for the plaintiff to establish that the alleged breach of duty was due to intentional and deliberate fraud. It is sufficient for him to prove such facts that would show that there has been a dereliction of duty, however innocently, arising from his position of fiduciary relationship.

Per GRATIAEN, J.—When a proctor is engaged to advise a client in regard to a proposed investment, "his contract of employment imposes on him a duty to act skilfully and carefully.....and, superimposed on this contractual duty, is the duty imposed by his fiduciary position to make a full and not a misleading disclosure of facts known to him when advising his client".

Quo Warranto

Irregular election—Person questioning the election taking part and concurring therein.

Rectification

Of deed—

See under Deed.

Registration of Documents Ordinance No. 23 of 1927

Registration of Documents—Sale of land subject to usufructuary mortgage—Subsequent sale to another—Prior registration of later deed—Possession by vendee on earlier deed after discharging of mortgage—Possession of usufructuary mortgagee—To whose benefit it enures—Prescription—Registration of Documents Ordinance No. 23 of 1927. Section 7 (1) and (4).

A property subject to a usufructuary mortgage was sold to the defendant on the 9th of August, 1927, and again to the plaintiff on the 10th of August, 1927. The plaintiff's deed P1 was registered prior to the defendant's deed 1D1, but the plaintiff never had any possession of the land. The usufructuary mortgagee remained in possession until 1939 when the defendant redeemed the mortgage and went into possession. In 1947, the plaintiff asked for a declaration of title to the land against the defendant who contended that he had title by long prescriptive possession which had commenced on a valid title derived by purchase.

Held: (1) That the defendant was entitled to the property by prescription as the possession of the usufructuary mortgagee must be presumed to enure to the benefit of the original mortgagor and thereafter to the person to whom the contractual rights of such mortgagor have at any relevant point of time been transmitted or ceded.

(2) The combined effect of section 7 (1) and (4) makes it clear that registration by itself confers no validity on an instrument unless and until a claim is based upon it.

Rent Restriction Act

Landlord and tenant—Tenant in arrears of rent—Notice to quit—Arrears tendered before plaint filed—Is landlord entitled to decree for ejectment—Rent Restriction Act No. 29 of 1948, section 13 (1) (a).

Held: That a landlord, who sues a tenant for ejectment on the ground that he has been in arrears of rent, is entitled to the decree prayed for notwithstanding the fact that before the action was filed the tenant tendered all arrears of rent due up to the date of action.

Res Judicata

Res Judicata—Action for declaration of title—Plea of jus-tertii by defendant—Third party's claim dismissed in previous action—Does it operate as a bar to defendant's plea.

Held: Where a defendant sets up a *jus-tertii*, though he himself may not be claiming under that title, it will be sufficient and competent for the plaintiff to repel that plea by showing that a judgment secured by him against the third party operates as *res-judicata* as between himself and the third party.

Per NAGALINGAM, A.C.J.—If a person who is privy in estate to Pandula cannot be permitted to dispute the findings in the case instituted against Pandula and to shew that Pandula was a son of Granville as against the brothers of Granville or their successors-in-title, it seems to me that *a fortiori* the principle must more strongly apply in the case of a third party, who is not a privy in estate and he, the third party is debarred from reagitating the questions finally disposed of by that case and shewing the contrary of what was decided in it—though the label of *res judicata* cannot properly be applied.

DADALLE DHARMALANKARA THERO *vs.* AHAMEDU LEBBE MARIKKAR 12

Roman-Dutch Law

Was Roman-Dutch law superseded by section 36 of the Matrimonial Rights and Inheritance Ordinance.

See Collation 81

Sale

Sale of minor's property sanctioned by Court after due inquiry—Conclusion of sale by execution of notarial conveyance—Subsequent offer of higher price by prospective purchaser —Can Court set aside such concluded sale.

See Minor 82

Thesavalamai

Thesavalamai—Right of pre-emption—Minor—Means to purchase at time of transaction—Notice of sale.

Under the Thesavalamai a co-owner, who had not the means to purchase a share of the common property at the time the transaction took place, cannot succeed in an action for pre-emption on the ground that no notice of sale was given to her.

MANGALESWARI (Minor) by her next friend SINNAMMAH *vs.* VELUPILLAI SELVADURAI AND 2 OTHERS 94

Trusts

Trusts Ordinance section 111—Applicability of—to administrator entering in that capacity upon property belonging to a deceased's estate.

See Prescription 75

Words and Phrases

"Bonus"

See Contract 53

"Candidate" in Municipal Councils Ordinance.

See Municipal Councils Ordinance 5

"Commission"

See Contract 53

"Ordinarily resident"

See Indian and Pakistani Residents (Citizenship) Act 92

"Share of profits"

See Contract 53

Present : NAGALINGAM, S.P.J., GRATIAEN, J. AND PULLE, J.

THE ATTORNEY-GENERAL vs. SRI SKANDARAJAH

In the matter of an application for a Writ of Mandamus on P. Sri Skandarajah, Chief Magistrate, Colombo.

Application No. 595

Argued on : 23rd and 24th January, 1952.
Decided on : 11th February, 1952.

Mandamus—Criminal Procedure—Commencement of proceedings under chapter 18—Assumption of summary jurisdiction by Magistrate under section 152 (3) Criminal Procedure Code—Pleas of accused recorded—Attorney-General's order to Magistrate to discontinue summary proceedings and to take non-summary proceedings—Validity of—Section 390 (2) of Criminal Procedure Code—Scope of.

Held : That the power of the Attorney-General under section 390 (2) of the Criminal Procedure Code to give instructions to a Magistrate is limited to non-summary inquiries under Chapter XVI of the Criminal Procedure Code and does not extend to trials either of summary offences or of non-summary offences in respect of which the Magistrate may have assumed jurisdiction under section 152 (3) of the Criminal Procedure Code.

Per GRATIAEN, J.—" In England, a Magistrate is expressly precluded from assuming, without the express consent of the Director of Public Prosecutions, summary jurisdiction to try indictable offences in cases in which the Director has taken over the conduct of the prosecution. In this country, however, the Attorney-General enjoys no such power of veto. In my opinion, it is very desirable that the provisions of section 152 (3) of the Criminal Procedure Code should be amended in this as well as in certain other respects ".

Cases referred to : *Re application of V. C. Villavarayan for a Writ of Prohibition* (1903) 7 N. L. R. 116 and *Silva vs. Silva* (1904) 7 N.L.R. 183.

H. W. R. Weerasuriya, Acting Solicitor-General, with *T. S. Fernando, C.C., R. A. Kannangara, C.C.*, and *N. T. D. Kanakaratne, C.C.*, for the Attorney-General.

S. Nadesan, with *Manohara*, for the accused parties noticed.

NAGALINGAM, S.P.J.

A Writ of Mandamus is applied for in these proceedings by the Attorney-General to compel the Chief Magistrate of Colombo to carry out certain instructions issued by him acting under the provisions of section 390 (2) of the Criminal Procedure Code.

The circumstances giving rise to this application briefly are : A report under section 148 (1) (*b*) was presented to the learned Magistrate by an Inspector of Police charging certain persons with having committed offences punishable under section 480 of the Penal Code. The learned Magistrate directed the issue of summons to the accused persons and on the day they appeared examined one of the principal witnesses for the prosecution and made order in the presence of Crown Counsel that he had decided to hear the case in his capacity as Additional District Judge in terms of section 152 (3) of the Code. After having made the order, the learned Magistrate charged the accused, recorded their pleas and set down the case for trial. At this stage the Attorney-General called for the record of the proceedings and, purporting to act under section 390 (2) of the Code, instructed the learned Magistrate (1) to discontinue the summary proceedings and (2) to take proceedings under Chapter 16 of the Criminal Procedure Code against the accused. When the case was taken up on the day fixed for trial, the learned Magistrate communicated to Counsel for the defence the instructions he had received, whereupon defence Counsel challenged the regularity, if not the legality, of the instructions issued by the Attorney-General. After hearing arguments on the point the learned Magistrate held that it was not competent for the Attorney-General to give instructions in case of a summary trial, which was the character of the proceedings before him, and directed the trial to proceed. Virtually, therefore, the learned Magistrate's order amounted to a refusal to comply with the instructions of the Attorney-General, and hence the application of the latter to this Court.

The controversy thus raised centres round the proper construction to be placed upon section 390 (2) of the Criminal Procedure Code.

The first question is, does the term " inquiry " in this sub-section extend to all proceedings of whatever nature before a Magistrate? Mr. Nadesan appearing on behalf of the accused persons by reference to the title to various

Chapters of the Code as well as to the language used in various sections therein pointed out, confining his argument to Magistrate's Courts, that the Code classifies under three separate categories the proceedings therein : (1) Inquiry, that is, a non-summary inquiry under Chapter XVI, (2) trial, that is, a summary trial under Chapter XVIII, and (3) proceedings, that is, steps taken or investigations made by a Magistrate which do not fall under either of the categories of trials or inquiries.

It is to be observed that the reference to the third category of proceedings was made by Mr. Nadesan, as at one stage of the argument it was suggested on behalf of the Crown, that the action or steps taken by a Magistrate in order to determine whether he should assume jurisdiction under section 152 (3) may properly fall under the designation of an inquiry in the sense of an inquiry under Chapter XVI, and Mr. Nadesan contended that the proper term to be applied to the steps taken by a Magistrate anterior to his determining the question whether he should act under section 152 (3) or not would properly be termed " proceedings " even as that term is used in the title to Chapter XV of the Code.

Mr. Nadesan submitted that the term " inquiry " in section 390 (2) is used in contradistinction to the terms " trial " and " proceedings," and properly signifies a non-summary inquiry under Chapter XVI of the Code, so that, according to him, neither a summary trial before a Magistrate nor proceedings which result in a Magistrate assuming jurisdiction under section 152 (3) fall within the designation of " inquiry " in sub-section 2 of section 390.

Mr. Nadesan also challenged the correctness of of the *obiter dicta* in the cases of *Re Application of V. C. Villavarayan for a Writ of Prohibition* (1903) 7 N. L. R. 116 and *Silva vs. Silva* (1904) 7 N. L. R. 183, where the view was expressed that the term " inquiry " in section 390 (2) was wide enough to include a summary trial.

In regard to those *obiter dicta* the learned Solicitor-General took up first of all the position that he claimed the benefit of the views expressed in these cases but stated that it was not necessary for the purpose of the present case for him to contend that an inquiry included a summary trial under this sub-section. In view, however, of the distinction drawn in the Code itself in various places as pointed out by Mr. Nadesan, the learned Solicitor-General subsequently conceded that the term " inquiry " in section 390 (2) properly designates only a non-summary inquiry under Chapter XVI.

Mr. Nadesan's next contention was that if this is the proper meaning to be attached to the term, there was in fact no inquiry before the Magistrate in the sense of a non-summary inquiry and therefore the Attorney-General had no power of direction under this sub-section in the circumstances of this case, for it was said by Mr. Nadesan and it was not denied by the learned Solicitor-General, that by the Magistrate having made order that he had decided to assume jurisdiction as a District Judge under section 152 (3) and by his taking the pleas of the accused persons and setting down the case for trial a summary trial had commenced before him and that was the only matter pending before him at the time the record of the proceedings was called for by the Attorney-General.

The argument on behalf of the Crown was in these circumstances narrowed down to one contention, which was formulated as follows : that the word " inquiry ", though properly referable to a non-summary inquiry under Chapter XVI of the Code, would embrace not only an existing or concluded inquiry but also one that may be said to lie dormant in the womb of the future.

The sub-section enables the Attorney-General to give such instructions as he may consider requisite " with regard to *the inquiry* to which such proceedings relate ". It will be seen that it is the definite article " the " that is prefixed to the word " inquiry " in this sub-section and not the indefinite article " an ". The learned Solicitor-General urges that no special significance attaches to the use of the definite article. There are other sections of the same Chapter where the indefinite article is prefixed to the word " inquiry" while in yet other sections the definite article is used. It seems to me that it is not without a due sense of appreciation of the effect of their use that the draftsman has employed the definite and indefinite articles in the way he appears to have done. " The inquiry " in this sub-section refers to the inquiry that has been or is being held before a Magistrate and referred to in sub-section 1 of section 390. This sub-section, it will be noticed, divides all inquiries before a Magistrate into two classes, (1) inquiries that have been held, that is to say, held and concluded (2) inquiries that are yet being held before him, that is to say, pending before him. There is no other third class of inquiries contemplated under this sub-section, such as, for instance, inquiries to be commenced in the future ; so that, when sub-section 2 refers to " the inquiry " the inquiry must fall under either one or the other of the above two classes and not to one yet unborn.

The learned Solicitor-General sought to reinforce his argument that the term " inquiry " included one in the future as well by formulating this question : Would it be competent or not for

the Attorney-General to call for the record of proceedings in which an inquiry is being held by a Magistrate in respect of, say, a charge of robbery, and to direct the Magistrate to discontinue the proceedings in respect of the charge of robbery and to direct him to commence an inquiry in respect of the offence of murder. The answer, no doubt, to this question was intended to be in the affirmative, and I think that is the correct answer.

The argument was then put forward that, if that be so, the inquiry into the charge of murder being an entirely new one and having its origin in the direction given by the Attorney-General and which could in no sense have been regarded as one that had either been concluded or been pending before the Magistrate, the propriety of the Attorney-General in giving directions in regard to an inquiry that was not *in esse* at the time the record was called for was thereby admitted, and if thus an inquiry non-existent at the time the proceedings were called for could be initiated properly by the Attorney-General, there could equally be no objection to an inquiry being ordered by the Attorney-General in regard to proceedings in a summary-trial in which there neither had been nor was a non-summary inquiry.

I do not think this result flows. In the former case, the instructions of the Attorney-General relate to the non-summary inquiry which was pending before the Magistrate, for by his directions the Attorney-General merely moulds the existing non-summary inquiry from one of a particular character into, true, that of an entirely different character, but nevertheless the instructions are in regard to *an inquiry* that was before the Magistrate. In the latter case there was and is no non-summary inquiry before the Magistrate at all, and what the Attorney-General purports to do in this latter case is really tantamount to his converting a summary trial into a non-summary proceeding by interfering with the progress of a summary trial.

Another point of view was put forward on behalf of the Crown by laying stress on the phrase "to which such proceedings relate", which qualify the words "the inquiry". It was urged that although there may have been no inquiry under Chapter XVI in respect of any particular proceeding before a Magistrate, nevertheless, where an inquiry under Chapter XVI is for the first time suggested by the Attorney-General, that would come within the category of inquiries to which such proceedings relate. This may be so. But in such a case the instructions would be not in regard to an inquiry but in relation to or in respect of proceedings before the Magistrate's Court irrespective of whether there was an inquiry or not. The sub-section, however, enacts that instructions should be in regard to the inquiry and not in regard to the proceedings. I do not therefore think that this argument is of any assistance.

A third line of argument was attempted based on the historical development of the legislation. In the earlier Criminal Procedure Code (Ordinance No. 3 of 1883) there was no provision for a Magistrate to try summarily a case triable by a District Judge. In 1896, however, the Ordinance was amended by Ordinance No. 8 of that year, whereby, by section 1 thereof provision was made for the first time that in cases where the same officer is both the Police Magistrate and the District Judge in a particular area then it should be lawful for the Magistrate to try summarily cases ordinarily triable by a District Court. He, however, was not called upon to give any reason for adopting a summary trial and, in fact, as observed in the case of *Silva vs. Silva* (1904) 7 N. L. R. 183 "nothing was left to the discretion of the Magistrate as to which of these cases (cases triable by District Courts) he might try".

By section 4 (*a*) of the abovesaid Amending Ordinance power was conferred on the Attorney-General to call for the proceedings in every case in which an inquiry or trial was being held under section 1 thereof. It should be observed that the effect of this was to enable the Attorney-General to call for proceedings in which a non-summary inquiry was being held as well as those in which the Magistrate has assumed jurisdiction to try summarily offences ordinarily triable by a District Judge. The Attorney-General, it will be noticed, was therefore not given power to call for proceedings where there was a summary trial proper, that is to say, a trial relating to an offence within the ordinary jurisdiction of a Police Magistrate.

Sub-section (*b*) of section 4 of the Amending Ordinance then proceeded to provide that in respect of any case forwarded to him under sub-section (*a*) the Attorney-General could exercise all or any of the powers conferred upon him by Chapters XVI and XX of the Code 1883. Chapter XVI of that Code related to non-summary inquiries and Chapter XX to powers of the Attorney-General, corresponding in the main to Chapters XVI and XXXV respectively of the present Code. Neither in Chapter XVI nor in Chapter XX of the old Code was any power vested in the Attorney-General to give instructions in regard to a trial. Both these Chapters, insofar as they refer to matters considered in this case, have application to powers in regard to non-summary inquiries.

The section particularly emphasised by the learned Solicitor-General for the purpose of his argument was section 253 of the Code of 1833, but as it will be essential to consider the two preceding sections too, I shall set out all three sections :—

> 251. Every Police Magistrate shall, whenever required so to do by the Attorney-General, forthwith transmit to the Attorney-General the proceedings in any case in which an inquiry has been or is being held before the Police Court of such Magistrate, and thereupon such inquiry shall be suspended in the same and the like manner as upon an adjournment thereof.
>
> 252. Whenever, in the course of any inquiry before a Police Court, the Police Magistrate of such a Court shall consider the case one of doubt or difficulty, or that there are peculiar circumstances connected therewith, or he shall be in doubt as to whether an accused person should be committed or not, he may, in his discretion, transmit the proceedings on such inquiry to the Attorney-General, in order that the Attorney-General may give such instructions in the case as to him shall appear requisite.
>
> 253. It shall be competent for the Attorney-General, upon the proceedings in any case being transmitted to him, under the provisions of the two last preceding sections, to give such instructions with regard to the inquiry to which such proceedings relate as he may consider requisite ; and thereupon it shall be the duty of the Police Magistrate to carry into effect, subject to the provisions of this Code, the instructions of the Attorney-General, and to conduct such inquiry in accordance with the terms of such instructions.

It will be seen that sections 251 and 252 both relate exclusively to non-summary inquiries ; so that, when section 253 refers to proceedings that are transmitted to him under the provisions of these sections, the proceedings are limited to non-summary inquiries. As a result of section 4 (*b*) of the Amending Ordinance conferring upon the Attorney-General all or any of the powers conferred by, to take the same section, namely section 253, even in regard to a summary trial held by a Police Magistrate in respect of a non-summary offence, the Attorney-General was vested with powers of interference in this class of summary trials. His powers would have therefore extended to directing the stay of a summary trial and the commencement of non-summary proceedings in regard to it.

The learned Solicitor-General contends that in these cases any exercise of his powers by the Attorney-General could only be justified if the directions given by him to a Magistrate to start non-summary proceedings in respect of a summary trial can be referred to the word " inquiry " in section 253, in other words, that the term " inquiry " here must embrace an inquiry non-existent at the date the proceedings are called for by the Attorney-General.

A decision in regard to this point is beset with the same difficulties that confront one in settling the main question that arises in these proceedings ; but I am of the view that it is not by virtue of any special significance that may have been attached to the term " inquiry ", as contended by the learned Solicitor-General, that the Attorney-General exercised his right of interference in summary trials held by a Magistrate in respect of non-summary offences, but because under sub-section (4) (*b*) the Attorney-General was empowered to exercise any of the powers conferred by Chapters XVI and XX, even in respect of trials of non-summary offences conducted by a Magistrate.

Furthermore, it seems to me that if one contrasts section 390 (2) of the present Code with section 4 (*b*) of the Amending Ordinance of 1896, the difference in phraseology tends to support the view that by the present Code the Legislature has divested the Attorney-General of the former power he had of giving directions in respect of trials held by a Magistrate in respect of non-summary offences. The learned Solicitor-General did not contend that even under the present Code the Attorney-General's powers can be said to extend to summary trials other than those held by virtue of the powers conferred by section 152 (3). It would be seen that as stated earlier, under the Amending Ordinance of 1896 the powers of the Attorney-General were limited to calling for records of trials which were held by a Magistrate in respect of offences ordinarily triable by a District Judge and did not extend to records of trials in which the Magistrate had his sole and exclusive jurisdiction. Under section 390 (1) of the present Code the powers of the Attorney-General have been much widened by empowering him to call for records even or trials of cases properly triable only by a Magistrate. While the Legislature did thus enlarge his powers in regard to calling for the proceedings, it clearly curtailed his right to give instructions by confining the instructions to inquiries alone by omitting the word " trial " in section 390 (2) ; if the Legislature had omitted any reference to inquiries in sub-section (2), then there can be no doubt that the position of the Attorney-General would have been greater than under section 4 (*b*) of the Amending Ordinance of 1896, for it could successfully then have been argued that the power of giving directions by the Attorney-General was intended to include both trials of non-summary offences held by him by virtue of section 152 (3) as well as trials of summary offences proper, that is to say, those within the ordinary jurisdiction of a Magistrate. The omission of the word " trial " when express

reference is made to inquiries in section 390 (2) is significant and can only lead to the inference that the Legislature deliberately intended an alteration of the powers of the Attorney-General.

In this view of the matter, even a historical consideration of the legislation on the subject does not assist the view of the Crown. I am therefore of opinion that the power of the Attorney-General to give instructions to a Magistrate is limited to non-summary inquiries under Chapter XVI and does not extend to trials either of summary offences or of non-summary offences in respect of which the Magistrate may have assumed jurisdiction under section 152 (3).

In view of the foregoing reasons, I reach the conclusion that the instructions given by the Attorney-General to the Chief Magistrate of Colombo were *ultra vires*. In these circumstances the application is refused.

GRATIAEN, J.

I agree that *mandamus* does not lie, and that the application must be refused.

Section 390 (2) of the Code does not in my opinion confer upon the Attorney-General any supervisory control over a Magistrate who, being also a District Judge, has in the exercise of his discretion assumed jurisdiction under section 152 (3) to try an offence summarily in accordance with the procedure laid down in Chapter 18. In the present case the proceedings under Chapter 18 had already commenced; the pleas of both accused had been duly recorded, and it was therefore the plain duty of the learned Magistrate to proceed with the summary trial according to law. It does not lie within the province of the Law Officers of the Crown to give any directions or instructions obedience to which would have the effect of divesting the Magistrate of a summary jurisdiction which he had lawfully assumed. It seems to me that the language of section 390 (2) is too clear and unambiguous to permit of reference to the historical development of the Attorney-General's statutory powers as a guide to interpretation.

If, in the opinion of the Attorney-General, a Magistrate has wrongly or improperly exercised his judicial discretion in any particular case, the only remedy available, as the law now stands, is to make an appropriate application for the intervention of this Court by way of appeal or revision. Section 390 (2) confers upon the Attorney-General wide supervisory control over the conduct of non-summary proceedings, but none in respect of summary trials. In England, a Magistrate is expressly precluded from assuming, without the express consent of the Director of Public Prosecutions, summary jurisdiction to try indictable offences in cases in which the Director has taken over the conduct of the prosecution. In this country, however, the Attorney-General enjoys no such power of veto. In my opinion, it is very desirable that the provisions of section 152 (3) of the Criminal Procedure Code should be amended in this as well as in certain other respects.

PULLE, J.

I agree for the reasons stated by my brethren in their judgments that the application fails.

Application refused.

Present : GUNASEKARA, J.

THASSIM vs. WIJEKULASURIYA AND OTHERS

S. C. No. 21.—In the matter of an APPLICATION FOR A WRIT OF QUO WARRANTO on (1) W. T. Wijekulasuriya, and (2) A. V. Chinniah, Commissioner, Municipal Council, Galle.

S. C. No. 24.—In the matter of an APPLICATION FOR A MANDATE IN THE NATURE OF A WRIT OF MANDAMUS on (1) A. V. Chinniah, Commissioner, Municipal Council, Galle, and (2) W. T. Wijekulasuriya.

Argued on : 10th and 11th March, 1952
Decided on : 18th March, 1952

Quo warranto *and* mandamus—*Application for—Election of Mayor, Galle Municipal Council—Three candidates—Withdrawal of one candidate after voting commences—Voting resulting in seven votes for petitioner, and six for first respondent—Second voting held thereafter resulting in eight votes for first respondent and seven for petitioner—First respondent declared Mayor—Was second voting, and election of first respondent valid?—Meaning of the term "candidate" in section 14 (4), Municipal Council's Ordinance, No. 29 of 1947, as amended by the Local Authorities (Election of Officials) Act, No. 39 of 1951—Irregularity in mode of election—Effect of petitioner's innocent participation—Plea of ignorance of the Law—Is petitioner estopped from impeaching election?—Section 14, Municipal Council's Ordinance, No. 29 of 1947, as amended by the Local Authorities Act No. 39 of 1951.*

The petitioner and the first respondent were candidates for election as Mayor of the Galle Municipal Council at a meeting of the Council held for that purpose. The second respondent was the Chairman of that meeting.

At the meeting in question, the names of three councillors—the petitioner, the first respondent and N. were duly proposed and seconded for election. After three councillors had exercised their rights of voting, N. withdrew from the contest, and the second respondent continued with the taking of the votes. In the result seven councillors voted for the petitioner, six for the first respondent and two declined to vote. The second respondent thereafter purported to hold a second voting which resulted in eight councillors voting for the first respondent, and seven for the petitioner. The second respondent thereupon declared the first respondent elected Mayor.

The petitioner contended that the second voting and the purported election of the first respondent were a nullity, and that having received more votes than the aggregate of the votes received by the first respondent and N. at the first voting, he was duly elected Mayor in accordance with the provisions of section 14 of the Municipal Council's Ordinance, No. 29 of 1947, as amended by the Local Authorities (Election of Officials) Act No. 39 of 1951.

Held : (1) That despite the fact that the provisions of section 14 (4) of the Municipal Council's Ordinance 29 of 1947, as amended by the Local Authorities (Election of Officials) Act No. 39 of 1952. were infringed, the inadvertent participation of the petitioner in the irregularity, and his concurrence thereto, disqualified him from impeaching the first respondent's title to the office.

(2) That the petitioner's plea that he was " not aware that the said further proceedings were void " was only a plea of ignorance of the law, which is not an excuse.

Per GUNASEKARA, J.—I agree with this view. The word " candidate " in the context in which it appears means no more, I think, than a Councillor who has consented to his name being proposed and seconded for election.

Cases referred to : *Inasitamby vs. Government Agent, Northern Province*, (1932) 34 N. L. R. 33, at 36.
Rex vs. Lane (1827) 9 Dow. Ry. K. B. 183.
Rex vs. Cobb 4 Dow. & Ry. M. C. 293.
Rex vs. Trevanon 2 B. & Ald. 339 & 479, 106 E. R. 391.
Rex vs. Slythe 6 B. & C. 240, 108 E. R. 441.
Rex vs. Lofthouse (1866) L. R. 1 Q. B. 433.
Rex vs. Colclough (1882) 1 N. L. R. 129, 16 Emp. Dig. 364 (note).

H. V. Perera, Q.C., with *E. B. Wikramanayake, Q.C.*, *Sir Ukwatte Jayasundera, Q.C.*, *S. Nadesan*, *M. H. A. Azeez*, *H. W. Jayawardene* and *G. Samarawickreme*, for the petitioner.

N. E. Weerasooriya Q.C., with *Chelvanayagam, Q.C.*, *C. S. B. Kumarakulasingha*, *Vernon Wijetunga*, *Izadeen Mohamed* and *A. S. Vanigasooriyar*, for the 1st respondent in S. C. No. 21 and the 2nd respondent in S. C. No. 24.

G. E. Chitty with *P. Somatilekam*, *Sharvanandam* and *Joseph St. George*, for the 2nd respondent in S. C. No. 21 and the 1st respondent in S. C. 24.

GUNASEKARA, J.

These two applications for mandates in the nature of a writ of *quo warranto* and a writ of *mandamus* respectively were heard together. I shall deal first with Application No. 21, which is the application for a writ of *quo warranto*.

The petitioner and the first respondent were candidates for election as Mayor of the Galle Municipal Council at a meeting that was held on the 15th January, and the other respondent, who is the Municipal Commissioner, was the Chairman of that meeting. All the Councillors, fifteen in number, were present, and after certain proceedings had been taken for the election of a Mayor, the Commissioner declared the first respondent elected, upon the footing that he had received eight votes and the petitioner the other seven. In due course the first respondent took the chair and the petitioner made a magnanimous speech congratulating him on his election and assuring him of his " fullest co-operation " in the execution of his duties as Mayor. He then consulted his lawyers and filed the present application for the purpose of having the first respondent's election declared null and void and having himself declared elected as the Mayor.

The procedure for an election is prescribed by section 14 of the Municipal Councils Ordinance, No. 29 of 1947, as amended by the Local Authorities (Election of Officials) Act, No. 39 of 1951. Sub-section (3) provides that the name of any Councillor may with his consent be proposed and seconded for election as Mayor by any other Councillor present at the meeting and the Councillors present shall thereupon elect, in accordance with the provisions of sub-section (4), a Mayor from among the Councillors proposed and seconded for election. At the meeting in question the names of three Councillors—the petitioner, the first respondent and E. D. Nagahawatte—were proposed and seconded for election. The Councillors then determined, under paragraph (*b*) of sub-section (4), that the mode of election should be by open voting. Thereupon the Commissioner pur-

ported to take the votes in the manner provided by paragraph (*c*), which reads as follows :

> " Where it is determined under paragraph (*b*) that the election of a Mayor or a Deputy Mayor shall be by open voting, the Commissioner shall take the votes by calling the name of each Councillor present and asking him how he desires to vote and recording the votes accordingly. A Councillor may state that he declines to vote, and in such case the Commissioner shall record that such Councillor declined to vote. The Commissioner shall declare the result of the voting."

The Councillor whose name was the first to be called voted for the first respondent. The next two declined to vote. At that stage, according to the " voting sheet " comprising the record made by the Commissioner at the time, E. D. Nagahawatte " withdrew ". The Commissioner recorded this " withdrawal " and continued with the taking of the votes. In the result seven of the Councillors voted for the petitioner and six for the first respondent, and two declined to vote.

It is contended for the petitioner that that was a valid voting and that having received more votes than the aggregate of the votes received by the first respondent and Nagahawatta he was duly elected Mayor in accordance with the provisions of paragraph (*e*) of sub-section (4). The terms of this paragraph are as follows :

> " Where more than two candidates are proposed and seconded for election as Mayor or Deputy Mayor and no candidate receives at the first voting more votes than the aggregate of the votes received by the remaining condidates, one candidate shall be excluded from the election as hereinafter provided and the voting shall proceed, one candidate being excluded from the election after each subsequent voting, until a candidate receives at a voting more votes than the aggregate of the votes received by the remaining candidates at that voting, or, as the case may be, until voting in respect of two candidates only is held and completed."

Paragraph (*f*) provides for the exclusion of the candidate receiving the lowest number of votes or one such candidate selected by lot.

After the voting to which I have just referred, the Commissioner purported to hold a second voting. On this occasion all the Councillors gave their votes, including the two who declined at the first voting and also the petitioner himself. Eight voted for the first respondent and seven for the petitioner, and the Commissioner declared the former elected Mayor. It is contended for the petitioner that this second voting and the purported election of the first respondent were a nullity and that at the end of the first voting it was the Commissioner's duty to declare the petitioner elected.

In an affidavit dated the 16th February the second respondent has given his account of the circumstances in which he decided to hold the second voting. When two of the Councillors declined to vote, he says, Nagahawatta stated "that he did not wish to stand for election and withdrew from the election and requested the Councillors supporting him to vote for W. T. Wijekulasuriya, the first respondent ", and he thereupon recorded in the voting sheet that E. D. Nagahawatta stated that he withdrew from the election, and he " proceeded to register the voting of the rest of the Councillors ". The result of this voting, he continues, was that the petitioner received seven votes, the first respondent six, and Nagahawatta none, and he " announced the result of this voting to the Councillors ". As however, Nagahawatta " had declared his unwillingness to stand for election after three Councillors had exercised their rights at the voting ", he thought that his proceeding to take the votes of the rest of the Councillors was " unfair and irregular ", and he, therefore, " without declaring the petitioner Mayor requested the Councillors to vote netween the first respondent and the petitioner who were now the only candidates ". He proceeds to say that he would not have taken this step if either of these two candidates had received at least eight votes in the first occasion, because then " whichever way the two votes of those who originally declined to vote were cast, it could not have affected the result ".

Much the same account appears in the minutes of the meeting signed by the second respondent as Municipal Commissioner. Having stated that the result of the voting was that the petitioner received seven votes, the first respondent six, and Nagahawatta none, and that two Councillors declined to vote, the minutes continue :

> " As neither of the two candidates obtained a minimum of eight votes and as Mr. E. D. Nagahawatta had declined to stand for election after a section of the House had already voted, the Municipal Commissioner proceeded to obtain a fresh voting between Messrs. Thassim and Wijekulasuriya."

The first respondent's affidavit adds nothing to what has already been stated by the second on this point. The petitioner's account is contained in the following paragraphs of his affidavit of the 20th January :—

> " 4. At the first voting I obtained seven votes, the 1st respondent six votes and E. D. Nagahawatta no votes. I having thus received more votes than the aggregate of the votes received by the remaining candidates was in terms of section 14 of the Municipal Councils

Ordinance No. 29 of 1947 as amended by the Local Authorities (Election of Officials) Act No. 39 of 1951 duly elected Mayor.

"5. The second respondent without duly declaring the result of the voting to be as set out in the last preceding paragraph held further proceedings without any warrant or justification in law by purporting to have a second voting after excluding the said E. D. Nagahawatta from the election and thereafter purported to declare the 1st respondent duly elected Mayor for 1952. I was not then aware that the said further proceedings were void."

This account suggests that the procedure followed was that prescribed, not for such a case as this, but for a case where more than two candidates are proposed and seconded for election and no candidate receives at the first voting more votes than the aggregate of the votes received by the remaining candidates. That this was the procedure which the Commissioner regarded himself as adopting is made clear by a document that he handed to the petitioner on the very first day, the 16th January, in response to a request for a copy of the minutes. This document which purports to be a draft of the minutes, states :

"When three votes were recorded, Mr. E. D. Nagahawatta declined to stand for election. The Commissioner stated that his name may be excluded after the first voting was fully recorded.

The voting resulted as follows :—

First Voting

For Mr. A. R. M. Thassim : Messrs. B. M. Charles, D. Y. Weerasirie, A. R. M. Thassim, H. K. Edmund, A. I. H. A. Wahab, L. E. Mendis and T. D. Abeywardene.

For Mr. W. T. Wijekulasuriya : Messrs. W. Dahanayake, W. T. Wijekulasuriya, E. D. Nagahawatta, D. A. S. P. Dahanayake, A. D. H. Weeratunga and M. Thaha Cassim.

For Mr. E. D. Nagahawatta : Nil.

Declined to vote : Messrs. A. H. E. Fernando and D. S. Goonesekera.

Second Voting.

For Mr. A. R. M. Thassim : Messrs. B. M. Charles, D. Y. Weerasirie, A. R. M. Thassim, H. K. Edmund, A. I. H. A. Wahab, L. E. Mendis, and T. D. Abeywardene.

For Mr. W. T. Wijekulasuriya : Messrs. W. Dahanayake, A. H. E. Fernando, D. S. Goonesekera, W. T. Wijekulasuriya, E. D. Nagahawatta, D. A. S. P. Dahanayake, A. D. H. Weeratunga and M. Thaha Cassim.

Mr. W. T. Wijekulasuriya was declared duly elected Mayor for 1952.

The words "Mr. Nagahawatta's name was excluded" were inserted in the draft by the second respondent in the presence of the petitioner before he handed the document to him.

I do not think that there is any material inconsistency between this version and the second respondent's affidavit, but if there is, the former should be preferred for the reason that his recollection of the events would have been better at the time when he prepared or adopted the draft minutes. It seems to me that the second respondent treated the election as one in which there were three candidates until the end of the first voting, and that at that stage he excluded from the election, in supposed compliance with the provisions of paragraphs (*e*) and (*f*) of section 14 (4), the candidate who received no votes. It is apparent that Nagahawatta's interruption of the proceedings raised a problem for the second respondent as to how he should proceed, in view of the other's statement that he did not wish to stand for election and that he withdrew and the element of confusion that it may well have introduced. Apparently he was in doubt as to whether Nagahawatta's name should be excluded immediately, but he thought that the problem would solve itself at the end of that poll if he took the rest of the votes ; and so he seems to have "stated that his (Nagahawatta's) name may be excluded after the first voting was fully recorded. When, at the end of the voting, he found that no candidate had received a majority of the possible votes, by polling at least eight votes, it appears to have occurred to him that the procedure he had adopted could result in unfairness and must therefore be "irregular", but he seems to have thought that any irregularity would be cured and any unfairness redressed by the next step that he thought he should take of excluding Nagahawatta from the election at that stage.

It is contended for both respondents that the first voting was a nullity. One ground upon which Mr. Chitty bases that contention is that Nagahawatta's conduct showed that he did not consent to stand for election. I do not think that this is a tenable ground : Nagahawatta made no protest when his name was proposed and seconded for election and it does not appear that even at the late stage at which he did speak he denied having consented to his name being proposed. Mr. Chitty next argues that if he did so consent he withdrew his consent later and thereby ceased to be a candidate. Mr. Chelvanayagam's argument, too, is that Nagahawatta ceased to be a candidate and therefore the first voting was a nullity : he had ceased to be a candidate in fact

and the law does not say that he must be deemed to be a candidate nonetheless. The view submitted by Mr. H. V. Perera in his reply is that sub-section (4) merely gives the Commissioner directions as to the steps that he must take in the election and does not, by the introduction of the word "candidate" add a new condition upon which those steps must be taken. The only conditions, he points out, are those laid down in sub-section (3), and a "continuing consent" to stand for election is not one of them. I agree with this view. The word "candidate" in the context in which it appears means no more, I think, than a Councillor who has consented to his name being proposed and seconded for election.

It seems to me, however, that it is implicit in view of the effect of sub-section (4) that the ground on which the first respondent's title to the office is impeached is merely a defect in the procedure by which he was elected. The Councillors who were present at the meeting were empowered by sub-section (3) to elect a Mayor from among those who were duly proposed and seconded for election, and they chose the first respondent from among such candidates by a majority of the whole number of Councillors (and not merely of those who were present), but the provisions of sub-section (4) which prescribes the mode of election were infringed. The petitioner himself participated in the irregularity, however, and is disqualified by his concurrence in the mode of election for impeaching the first respondent's title to the office. His plea that he was "not then aware that the said further proceedings were void" is only a plea of ignorance of the law, which is not an excuse. The gist of the decisions regarding the effect of acquiescence is stated by Jayawardene, A.J., in *Inasitamby vs. Government Agent, Northern Province* (1932) 34 N. L. R. 33, at 36, as follows :—

> "It is a general rule of Corporation Law that a corporator is estopped from coming forward as a relator to impeach a title conferred by an election in which he has concurred (*Rex vs. Lane* (1827) 9 Dow. Ry. K. B. 183 and *Rex vs. Cobb* 4 Dow. & Ry. M. C. 293. It is a valid objection to a relator that he was present and concurred at the time of the objectionable election even though he was ignorant of the objection, for a corporator must be taken to be cognisant of the contents of his own Charter and of the Law arising therefrom (*Rex vs. Trevanon* 2 B. & Ald. 339 and 479, 106 E. R. 391). Where a corporator has attended and voted at a meeting, he will not be allowed to become a relator, unless he shows that at the time of the election he was ignorant of the objection subsequently taken (*Rex vs. Slythe* 6 B. & C. 240, 108 E. R. 441). A relator who has acquiesced in and himself adopted the mode of voting he now objects to, is disqualified from applying for a rule (*Rex vs. Lofthouse* (1866) L. R. 1 Q. B. 433), and a rule will not be granted to a relator who has participated in the alleged irregularities on which he based his application (*Rex vs. Colclough* (1882) 1 N. L. R. 129, 16 Emp. Dig. 364 (note)."

(The ignorance referred to in *Rex vs. Slythe* is ignorance of some fact making the election invalid and not ignorance of the law.)

Application No. 21 is refused. Application No. 24, for a mandate in the nature of a writ of *mandamus* is also refused. In each case the petitioner will pay the costs of the first respondent, that is to say, the respondent W. T. Wijekulasuriya in application No. 21 and the respondent A. V. Chinniah in application No. 24.

Application refused.

Present : NAGALINGAM, A.C.J. AND SWAN, J.

CEYLON MOTOR INSURANCE ASSOCIATION LIMITED vs. P. P. THAMBUGALA

S. C. No. 57—D. C. Colombo 22799/M

Argued on : 7th May, 1952.
Decided on : 20th May, 1952.

Insurance—Third party risk—What is sufficient and adequate notice of action to the insurer ?—Should the particular forum be expressly stated in such notice ?—Sections 133 *and* 134. *Motor Car Ordinance No.* 54 *of* 1938.

A person who had been injured in a car accident wrote a letter to the Insurance Company, with which the car that had caused the accident was insured, stating that he intended filing action against the insured for the recovery of damages caused to him by the accident. The letter further stated, the number of the car and that it had been insured with the Company, the date of the accident, the amount of damages and also alleged negligence on the part of the insured.

Held : That the notice as given in the letter sufficiently complied with the requirements of section 133 of the Motor Car Ordinance No. 54 of 1938 and the forum where the action was to be filed was not necessary.

H. V. Perera, Q.C., with *G. T. Samarawickrema*, for the defendant-appellant.

E. B. Wikramanayaka, Q.C., with *J. N. Fernandopulle*, for the plaintiff-respondent.

NAGALINGAM, A.C.J.

This is an appeal by the defendant company who is an insurer against third party risks of one K. Stephen Perera in respect of motor vehicle bearing registration No. X 4851 from a judgment entered against it decreeing the payment of a sum of Rs. 13,881·22, legal interest and costs, to the plaintiff-respondent who claimed the sum on the basis that he has sustained injuries as a result of the negligent driving of the motor vehicle referred to. The only point for determination is whether notice sufficient and adequate in terms of section 134 of the Motor Car Ordinance No. 54 of 1938 had been given to the appellant, for it is conceded by the respondent that if no such notice had been given then the appellant company would not be liable to him.

As is well known, prior to the enactment of the provisions of the Ordinance relative to third party risks, there were cases where, though the injured party secured a judgment against the owner of the motor vehicle the reckless and negligent driving of which caused the injury, it was found that the decree was an empty one in the sense that the judgment-debtor was financially incapable of satisfying the debt. The result of the situation thus arising was sought to be remedied by the Legislature by passing an enactment embodying provisions intended to protect society against such unfortunate consequences. The Legislature for the first time in the history of our country passed the Ordinance above referred to, whereby it made it essential for an owner of a motor vehicle to effect insurance against third party risks before putting the vehicle on the road; insurance could be effected only with a person or firm termed under the Ordinance an authorised insurer, that is to say, one whose ability to meet a third party liability was considered satisfactory. In the light of these observations it must be abundantly clear that the provisions of the law should, if there be be any ambiguity be construed beneficially in favour of an injured party rather than in favour of the insurer, but I am satisfied that on a plain construction of the provisions of the Statute no resort need be had to this principle, for the enactment construed according to its plain language is clear and satisfies the tests both of the spirit of legislation and the letter of the law.

Section 133 of the Ordinance imposes the liability upon an insurer to satisfy decrees obtained by an injured third party against the assured in respect of a vehicle that has been insured with it, subject to certain limitations contained therein which I shall notice presently, provided. Of course, it has issued a certificate of insurance as required by section 128 (4). Section 134, however, makes the insurer's liability under section 133 dependent upon his being given notice by the third party, and the relevant provision of the section runs as follows :—

> "No sum shall be payable by an insurer under the provisions of section 133—
>
> (*a*) in respect of any decree, unless before or within seven days after the commencement of the action in which the decree was entered, notice of the action had been given to the insurer by a party to the action;"

Notice under this provision may be given either before commencement of the action or within seven days after the commencement of the action, and the notice thus required to be given is "notice of the action." Difficulty is said to arise in construing this provision because the notice that is to be given is stated to be notice of the action, and the question has been raised what is meant by "the action". Where the notice is given after the commencement of the action, it is easy enough to identify the action by the action that has been filed, and it would be possible not only to specify the particular Court where the action has been instituted but also to particularize the suit by furnishing the specific number assigned to it; but where notice is given before the commencement of the action, it is said that notice cannot be given of the action because in fact there was no action in existence at the date of the giving of notice so as to permit of a notification of the particular Court or even of any number that may be assigned to it. But it seems to me that when the section refers to "the action" it means the action in which the decree was entered as indicated in the earlier part of the section, and what the section requires is that notice should have been given of the action in which the decree was entered and that notice would be adequate if the action that is filed subsequently can be identified as the action in contemplation of which notice had been given.

Ordinarily speaking, the requisites necessary to identify an action are (*a*) the name of the plaintiff and perhaps his address (*b*) the name and address of the defendant (*c*) the nature of the injury and the cause of action that gives rise to the claim (*d*) the relief or quantum of damages that is claimed. It has, however, been urged on

behalf of the appellant that while these requirements may be sufficient where the Legislature requires notice to be given of an action in the generality of enactments, (see the case of *Dulfa Umma et al vs. U. D. C. Matale* (1939), 40 N. L. R. 474 nevertheless in this particular instance under this particular Ordinance the notice that is contemplated requires at least one other particular, in the absence of which the notice cannot be regarded as sufficient within the meaning of that section. It is said that, inasmuch as the action notice of which may be given in the terms set out above is capable of being filed in more than one Court, the particular Court wherein it is proposed to institute the action should also be furnished, though not necessarily, as argued in the lower Court, the date on which it is proposed to file the action or all the essentials that have to be stated in a plaint in respect of such a cause of action in terms of the Civil Procedure Code. There is nothing express in the section itself which requires that the forum wherein the action would be instituted should be notified to the insurer, but it is sought to argue that such a term is implied not because of anything contained in the section itself but because of the supposed objects the Legislature must have had in mind in framing this provision. One of the objects, it is said, was to enable the insurer either to assist the assured in his defence or to take over the defence himself in terms of the contract between the insurer and the assured in respect of the action instituted by the third party against the assured. It is conceded that one of the other objects would be to enable the insurer to obtain a declaration of non-liability under section 136 or 137 of the Ordinance ; but a persual of the provisions of sections 136 and 137 leave no room for doubt that the particular forum where the action is to be instituted by the third party against the assured is unnecessary to enable the insurer under either of those sections to obtain a declaration of non-liability, and it must not be forgotten that section 133 itself expressly refers to the liability accruing to the insurer under it as being subject to the provisions *inter alia* of section 136 and 137.

The question, then, narrows itself down to a determination as to whether the contention that the particular forum should be expressly stated in the notice to the insurer in order that he may take over the defence or assist in the defence of the action instituted against the assured is entitled to succeed. In the ordinary run of cases, one would expect the assured to be the first person to communicate with the insurer in regard to the accident which gives rise to the third party claim, and one would also expect that as it is one of the conditions of liability as between the insurer and the assured that the assured would also notify the insurer of the particular action commenced against him by the third party for the recovery of damages.

In this case, there is a total absence of evidence as to whether the insurer received notice from the assured, and the case has to be decided on the footing that the insurer, as stated by him, did not receive any notice from the assured either of the accident or of the proceedings commenced against him. It seems to me that the provision as regards notice to the insurer has been framed by the Legislature against a background of knowledge that there is always a condition in the policy issued to the assured that the insurer will not be liable to the assured unless notice is given forthwith of the accident and of the proceedings, if any, against him, for if there be a violation of this condition the insurer ceases to be liable for any claim that the assured may make against the insured in respect either of his own vehicle or of damage payable by him to a third party.

But what, then, if in fact the assured fails to notify the insurer of either the accident or of the proceedings commenced against the assured in respect of a third party claim ? It seems to me that the Legislature has been alive to such a contingency and has provided section 130 to meet such a situation. Further, on general principles, the insurer would have a right of recourse against the insured where owing to the default of the latter the former has become liable to make payment. Looking at the question from a practical point of view, any authorised insurer alive to his obligations and alive to the circumstance that it has been recognised as an authorised insurer would, if he pursued a policy of business honesty, at least ask the third party who has given him notice of the action before institution of the action to notify it and to give it particulars of the action when instituted, but as I have already indicated, such a course would hardly arise for normally the assured would keep the insurer informed of these relevant facts, but of course in determining the question any consideration of what ordinary business morality should dictate to an insurance company cannot and need not be taken into consideration. One has simply to construe the provisions of the statute. Construing the provision as I have already indicated, there is nothing in the section which requires that the forum should be notified.

It would be convenient at this stage to look at the notice itself, which was sent to the appellant by the respondent, which runs as follows :—

" The Manager,
The Ceylon Motor Insurance Co.,
Fort, Colombo.

Re Car No. X—4851

Dear Sir,

We are instructed by Mr. P. P. Thambugala of Manikkawa Walauwa in Mawanella to file an action for the recovery of Rs. 15,000 against Mr. Kodituwakku Aratchige Stephen Perera of Mawanella being damages sustained by our client as a result of the above car knocking down our client on the 1st September, 1945, by reason of the negligent and careless driving on the part of his driver.

We are given to understand that the above car has been insured with your company.

Our client is still under treatment and unless our client's claim is settled on or before the 31st instant, we are instructed to file action against the owner of the car.

Yours faithfully,
(Sgd.) JAYASEKERE & JAYASEKERA."

The notice specifically gives the name and address of the plaintiff who proposes to file the action, the name of the person against whom it is proposed to file the action and his address, the cause of action including specific reference to the number of the motor vehicle and the amount claimed. It seems to me that these are all the particulars that the section requires to be furnished. It is true that the notice does not state where the action is proposed to be filed but, as I said earlier, I do not think the phrase " notice of action " involves in it any content as regards the forum where the action is to be instituted. I am therefore of opinion that the notice sufficiently complies with the requirements of the section.

Another ground urged against the sufficiency of the notice is said to be that the notice is not an absolute in its terms but is vague in that it leaves uncertain whether the action would be filed or not, depending on whether the claim would be settled or not. The basis of this this argument is that the terms of the notice are capable of being construed as meaning that the settlement of the claim is to be made by either the owner of the vehicle or the insurer. I do not think that the notice is capable as such a construction. The intimation that the action would be filed unless the claim was settled prior to a particular date clearly has reference to a settlement being effected by the insurer and not by the assured. That is the plain meaning of the notice and, what is more, that is the meaning in which the notice was understood by the insurer himself, as is apparent from his reply P2, and the only ground upon which he refutes the claim made is that the insured " had failed to report the accident in terms of the conditions of the policy issued to him ". In this view of the meaning to be attached to the notice it cannot be regarded as one involved in any ambiguity. It is obvious that the notice intimates that unless the insurer pays the claim action would be filed, and that is a matter entirely within the insurer's knowledge, and where he does not settle the claim he would know that the action would be filed after the date specified. I therefore hold that the notice P1 is sufficient and adequate in terms of section 133 of the Ordinance.

For the foregoing reasons I would affirm the judgment of the learned District Judge and dismiss the appeal with costs.

Swan, J.

I agree.

Appeal dismissed.

Present : NAGALINGAM, A.C.J. AND SWAN, J.

DADALLE DHARMALANKARA THERO vs. AHAMEDU LEBBE MARIKKAR

S. C. No. 43—*D. C. Colombo No.* 5389

Argued on : 20th May, 1952.
Decided on : 21st May, 1952.

Res Judicata—Action for declaration of title—Plea of jus-tertii by defendant—Third party's claim dismissed in previous action—Does it operate as a bar to defendant's plea.

Held : Where a defendant sets up a *justertii*, though he himself may not be claiming under that title, it will be sufficient and competent for the plaintiff to repel that plea by showing that a judgment secured by him against the third party operates as *res-judicata* as between himself and the third party.

Per NAGALINGAM, A.C.J.—If a person who is privy in estate to Pandula cannot be permitted to dispute the findings in the case instituted against Pandula and to shew that Pandula was a son of Granville as against the brothers of Granville or their successors-in-title, it seems to me that *a fortiori* the principle must more strongly apply in the case of a third party, who is not a privy in estate and he, the third party is debarred from reagitating the questions finally disposed of by that case and shewing the contrary of what was decided in it—though the label of *res judicata* cannot properly be applied.

H. V. Perera, Q.C., with *E. D. Cosme* and *O. M. Da Silva*, for the 1st defendant-appellant.

C. Thiagalingam, Q.C., with *L. G. Weeramantry* and *T. Parathalingam*, for the plaintiff-respondent.

NAGALINGAM, A.C.J.

The defendant appeals from a judgment of the District Court of Colombo whereby the plaintiff has been declared entitled to the land described in the schedule to the plaint, of which the defendant is in possession, and the defendant ordered to be ejected therefrom and to pay damages and costs to the plaintiff.

The appeal can be disposed of on a short point, and I do not therefore propose to consider the various points raised on appeal. Admittedly the land in question belonged to one Don Hendrick Seneviratne, under whose last will, it is common ground, the land was devised to his son Granville subject to the certain conditions, of which the only one that needs be noticed is that on Granville's death without children the property was to devolve on his brothers and sisters, subject to the proviso that if his wife survived him she was to be entitled to certain limited interests. According to the plaintiff, Granville died unmarried and issueless, and thereupon the property devolved on his two brothers Irwin and Vincent and his sister Helena Dias, whose interests have now been acquired by him. Granville died in 1944. The defendant has no conveyance in his favour but asserts that in 1934 Granville had dedicated the land to the Sangha and delivered possession of it to him, who is a Buddhist priest, and that he has been in possession of it ever since.

The defendant, conceding that though he may have no title himself to the land, yet says that he is entitled to shew, as he undoubtedly is, that the plaintiff himself, who seeks a declaration of title, is one who has no title, and that the title is in some third party. His case is that the real title is in one Pandula, who, he alleges, is a legitimate child of Granville, and that therefore the conveyances in favour of the plaintiff from the brothers and sisters or their descendants are of no avail.

The plaintiff answers this by saying that the two brothers of Granville instituted an action against *inter alios* Pandula, claiming a declaration of title to a 2/3 share *inter alia* in the land in dispute and allotting to their sister Helena Dias the remaining 1/3. In that case the plaintiffs expressly averred that Pandula was not a son of Granville and that he was entitled to no interests in the land; after trial decree was entered in favour of the plaintiffs declaring them entitled as against Pandula and certain others to a 2/3 share of the land in dispute, and the judgment further held that Pandula was not a child of Granville and that the remaining 1/3 share in the land in dispute was vested in Helena Dias, or more properly, in Helena Dias' heirs, as Helena Dias was dead at the time the decree came to be entered.

In reply to this the contention put forward on behalf of the defendant is that whilst a privy in estate to Pandula claiming the land could successfully be met by a plea of *res judicata*, the defendant is not so bound, as he is not a privy in estate, and that therefore the matter is at large so far as he is concerned, and that he is entitled to shew that Pandula in point of fact was a legitimate child of Granville and so entitled to the property.

No authority has been cited either in support of or against this proposition. The matter, therefore, has to be adjudicated upon on first principles. If a person who is privy in estate to Pandula cannot be permitted to dispute the findings in the case instituted against Pandula and to shew that Pandula was a son of Granville as against the brothers of Granville or their successors-in-title, it seems to me that *a fortiori* the principle must more strongly apply in the case of a third party who is not a privy in estate and he, the third party, is debarred from re-agitating the questions finally disposed of by that case and shewing the contrary of what was decided in it—though the label of *res judicata* cannot properly be applied.

In regard to Helena Dias' title, too, the finding that Pandula was not a child of Granville completely disposes of the contention that a 1/3 share is vested in Pandula. I think, where a defendant sets up a *jus tertii*, though he himself may not be claiming under that title, it will be sufficient and competent for the plaintiff to repel that plea by shewing that a judgment secured by him against the third party operates as *res judicata* as between himself and the third party, for such a judgment is the best proof that the third party has no title as against and puts an end to the plea. Indeed, if a contrary view be taken, it would be obvious that the very principles underlying the doctrine of *res judicata* would be set at nought and the unfortunate result would be that the same question would be permitted to be litigated as many times as the number of trespassers without title who could be found willing and capable of interfering with a plaintiff's possession.

I therefore hold that the defendant is debarred from shewing that the title is not in the plaintiff but in Pandula. The appeal therefore fails and is dismissed with costs.

SWAN, J.

I agree.

Appeal dismissed.

Present : GRATIAEN, J. AND GUNASEKARA, J.

P. A. PATHIRANA *et al* vs. G. G. D. B. GUNAWARDHENA

S. C. No. 369—*D. C. Kandy, No.* 2302/L.

Argued on : 28th February, 1952.
Decided on : 27th March, 1952.

Donation—Deed conveying property absolutely subject to prohibition against sale or mortgage—Fidei commissum.

Where by deed a donor conveyed property to donee, her heirs, executors, administrators and assignes by " *way of a gift absolute and irrevocable*....." provided that the donee should not sell or mortgage the property except to the donor's children mentioned in the deed.

Held : That the deed did not create a *fidei commissum* and that the donor intended to pass to the donee full rights of ownership in the property.

Cases referred to : *Nadaraja on Fidei commissum*, pages 252—256.
Robert vs. Abaywardene (1912) 15 N. L. R. 323.
Livera vs. Gunaratne (1914) 17 N. L. R. 289.
Amarawickreme vs. Jayasinghe (1922) 23 N. L. R. 462.
Hettiaratchi vs. Suriaratchi (1922) 24 N. L. R. 140.
Rodrigo vs. Perera (1923) 24 N. L. R. 421.

H. W. Thambiah, for the defendants-appellants.
Cyril E. S. Perera, with *T. B. Dissanayake*, for the plaintiff-respondent.

GRATIAEN, J.

A person named Dissanayake Mudianselayegedera Mudiyanse was at one time the owner of the property to which this action relates. By a deed of donation No. 9411 of 21st February, 1921, (marked P1) he gifted the property to his daughter Nonno Hamine upon certain terms and conditions which I shall later set out. Nonno Hamine, with the consent and concurrence of her husband, purported by a deed P2 of 29th August, 1940, to convey the property for valuable consideration to the plaintiff, who thereupon sued the appellants for a declaration of his rights thereto.

The appellants are the lawful children of Nonno Hamine who has since died. Their defence is that P2 passed no title to the plaintiff because the deed of donation P1 in their mother's favour created a valid *fidei commissum* whereby the property vested in them upon her death. The learned District Judge rejected this submission, and the only question which arises upon this appeal is whether the deed P1 created a *fidei commissum* having the effect contended for by the appellants.

The deed under consideration conveyed a specified property to each of the donor's five children (including Nonno Hamine), each property passing in its entirety to a particular donee subject to a life interest in favour of the donor and his wife (both of whom are now dead), and subject also to certain other conditions which were in each case identical.

The conveyance of the property in dispute to Nonno Hamine is expressed to be in favour of herself, her " heirs, executors, administrators and assignees *by way of a gift absolute and irrevocable* ". *Prima facie*, these words would indicate that full rights of ownership had been intended to pass to the recipient of the gift, unless indeed one can find any other words in the instrument pointing very clearly to a diminution of the *plena proprietas* in favour of someone else. *Nadaraja on Fidei commissum*, pages 252—256.

The appellants contend that there is a clear expression in the instrument of an intention to burden Nonno Hamine's interest in the property with a *fidei commissum* in their favour. The words relied on in support of this argument are to the following effect:-

> " provided that the said donees (*i.e.* in the present case, Nonno Hamine) *shall not sell or mortgage the said premises except to one or other of the donees herself* (*i.e.* in the present case, to one of the donor's other children mentioned in the document).

Mr. Thambiah reminds us, by reference to earlier judicial pronouncements which were certainly not easy to reconcile, that one school of thought has construed such words as these as impliedly creating a *fidei commissum* in favour of the " beneficiaries of the prohibition against alienation ". *Robert vs. Abaywardene* (1912) 15 N. L. R. 233, and *Livera vs. Gunaratne* (1914) 17 N. L. R. 289. Another school of thought, however, seems to construe such a prohibition as a *nudum praeceptum* " except perhaps to give the named beneficiaries a right of pre-emption ". *Amarawickreme vs. Jayasinghe* (1922) 23 N. L. R. 462, *Hettiaratchi vs. Suriaratchi* (1922) 24 N. L. R. 140 and *Rodrigo vs. Perera* (1923) 24 N. L. R. 421. It is unnecessary

however to decide for the purposes of the present appeal which of these alternative views is correct, for neither interpretation would assist the appellants. It is quite clear that the words of the proviso which I have quoted do not, either expressly or by implication, indicate that the property was under any set of circumstances intended by the donor to pass to Nonno Hamine's children or her intestate heirs either upon her death or in the event of a breach of the prohibition contained in the deed. They are certainly not the beneficiaries of the prohibition contained on the deed, and I would therefore dismiss the appeal with costs.

GUNASEKARA, J.

I agree.

Appeal dismissed.

Present : DE SILVA, J.

SUYAMBULINGAM CHETTIAR, A. R. *et al* vs. PECHI MUTTU CHETTIAR

S. C. No. 207—*C. R. Colombo No.* 32190.

Argued on : 20th February, 1952.
Decided on : 3rd April, 1952.

Landlord and tenant—Tenant in arrears of rent—Notice to quit—Arrears tendered before plaint filed—Is landlord entitled to decree for ejectment—Rent Restriction Act No. 29 *of* 1948, *section* 13 (1) (*a*).

Held : That a landlord, who sues a tenant for ejectment on the ground that he has been in arrears of rent, is entitled to the decree prayed for notwithstanding the fact that before the action was filed the tenant tendered all arrears of rent due up to the date of action.

Cases referred to, not followed : *George vs. Richard* 50 N. L. R. 128.
approved : *Fernando vs. Samaraweera* 52 N. L. R. 278 44 C. L. W. 19.

H. W. Thambiah, for the plaintiffs-appellants.
C. Chellappah for the defendant-respondent.

DE SILVA, J.

This is an action for rent and ejectment. The defendant-respondent is the tenant of the plaintiffs-appellants of premises No. 40/53, St. Joseph Street, Grandpass, Colombo, on the footing of a monthly tenancy. The plaintiffs came to Court claiming rent and ejectment of the defendant on the ground that the defendant was in arrears of rent for the months of November and December, 1950, and January, 1951.

The learned Commissioner after trial dismissed the plaintiffs' action with costs. The question that comes for decision in this appeal is the right of the plaintiffs to institute and maintain this action for rent and ejectment, notwithstanding the fact that before the action was filed the defendant tendered all arrears of rent due up to the date of action.

The issues framed and adopted at the trial were :—

(1) Is the defendant in arrears of rent for the months of November and December, 1950, and January, 1951, within the meaning of section 13 (1) (*a*) of the Act ?

(2) Was due notice to quit given on the 29th January, 1951, to quit at the end of February, 1951 ?

(3) If issues Nos. 1 and 2 are answered in the affirmative, is the plaintiff entitled to a decree in ejectment ?

(4) Did the defendant duly tender the rents for the months in question ?

(5) If so, can he be said to be in arrears of rent ?

The 2nd plaintiff-appellant gave evidence at the trial and produced certain documents. It was averred in the plaint that the agreement between the parties was for the tenant to pay the rent monthly on the first day of the succeeding month for the previous month. The 2nd plaintiff-appellant who gave evidence supported the averment in the plaint regarding the mode of payment of the rent. The defendant led no evidence. The plaintiffs have proved what the agreement was as regards the manner of payment of rent. It was proved at the trial that the defendant was in arrears of rent for the months of November and December, 1950, when on the 29th of January, 1951, the plaintiffs through their proctor gave the defendant notice to quit the premises at the end of February, 1951.

It would appear that on the 5th of February, 1951, the defendant sent the 2nd plaintiff a sum of Rs. 45·60, being rent for the months of November and December, 1950, and January, 1951, the

rent for each month admittedly being Rs. 15·20. The 2nd plaintiff on the 6th of February, 1951, received a postal order for Rs. 45·60 which came from Mr. Zaheed. This action was instituted on 6-3-51.

The learned Commissioner has answered the issues thus :—

(1) No.
(2) Yes.
(3) Does not arise.
(4) Yes.
(5) No.

In the result the plaintiffs' action was dismissed.

The Rent Restriction Act undoubtedly places a fetter on the common law right of the landlord to institute an action or proceedings for the ejectment of the tenant to which the act applies, unless the Board has in writing authorised the institution of such proceedings, subject to the proviso that the authorization of the Board shall not be necessary in any case where rent has been in arrear for one month after it has become due.

In the case under consideration the rents for November and December, 1950, became due on the 1st of December, 1950, and on the 1st of January, 1951, respectively. The notice to quit was given on the 29th of January, 1951. When on the 5th of February, 1951, defendant sent the plaintiff a sum of Rs. 45·60 by postal order being rent for three months, he was clearly in arrears of rent for more than a month for the months of November and December, 1950. When the notice to quit was sent the defendant was in arrear of rent for the month of November, 1950, for more than a month. The act has not taken away the right of the landlord to terminate the tenancy by giving the tenant the requisite period of notice. In this case the tenancy being monthly, a month's notice has been given terminating the tenancy. The tenant, whose tenancy has been so terminated, becomes a statutory tenant. The act gives the landlord the right to sue in ejectment a tenant who has been in arrears of rent for one month after it has become due. Thus certain rights had been created in the landlord. Can those rights be taken away from him by the tenant without the consent or acquiescence of the landlord ?

The Act creates certain rights in favour of the tenant and also imposes certain obligations which he has to fulfil. The tenant is obliged not to allow his rent to fall into arrear for one month after it has become due. The violation of the statutory duty on the part of the tenant forthwith creates certain rights in the landlord which unless waived by the latter, must be recognized.

To deny to the landlord the benefits which the statute has given him under the circumstances is certainly to place the landlord at the mercy of the tenant.

One can conceive of a case of a tenant being in arrears of rent for several months, nay, years, and only when he is threatened with a suit for ejectment, paying the rent for the period for which he was in arrears and thereafter continuing to be in occupation. What then is the position of the landlord ?

I have been referred to *Fernando vs. Samaraweera* 52 N. L. R. 278.* Basnayake, J., has thus observed :—

> " Once a tenant commits a breach of any one of his statutory obligations the bar against the institution of proceedings in ejectment enforced by section 13 of the Act is removed and there is nothing that statutory tenant can do to regain his immunity from eviction. His rights and obligations are governed by the statute and immediately he violates its provisions the consequences of such violation begin to flow.
>
> For instance, if he is in arrears of rent for one month after it has become due the landlord becomes free to institute proceedings in ejectment. He cannot prevent his eviction by process of law by tendering the rent out of time either before or after the institution of legal proceedings. The consequences of the failure to observe the obligations imposed by the statute cannot be avoided by doing late what should have been done in time ".

Basnayake, J., has cited two judgments of South African Courts in his judgment.

A contrary view has been taken by Nagalingam, J., in *George vs. Richard* 50 N. L. R. 128. I find myself in agreement with the view expressed by Basnayake, J., in *Fernando vs. Samaraweera* (supra).

I hold that the plaintiff-appellants have made out a case to entitle them to a decree as prayed for. I answer the issues framed thus :—

(1) Defendant is in arrears of rent for the months of November and December, 1950, within the meaning of section 13 (1) (*a*) of the Act.
(2) Yes.
(3) Yes.
(4) No.
(5) Does not arise in view of the answer to issue No. 4.

The judgment and decree of the lower Court are set aside and judgment is entered in favour of the plaintiffs-appellants as prayed for. The defendant-respondent will pay the plaintiffs their costs of appeal and of the trial in the Court below.

Appeal allowed.

* 44 C. L. W. p 19. (Edd.)

Present : NAGALINGAM, A.C.J. AND SWAN, J.

JAFFERJEE vs. THE ATTORNEY-GENERAL

S. C. No. 501—D. C. Colombo, No. 19869.

Argued on : 11th March, 1952.
Decided on : 17th March, 1952.

Principal and Agent—Government official contracting with plaintiff's agent in Ceylon to indent goods from foreign country on commission—Order executed and goods accepted though not consigned to the official as agreed—Action by plaintiff as undisclosed principal against Crown for balance due—Privity of contract—Plaintiff's right to sue—Mixed question of fact and law—Can it be raised for first time in appeal.

The Government of Ceylon through the Commissioner of Co-Operative Development placed an order with a local firm of indenting agents for certain goods to be imported from a foreign country. It was agreed *inter alia* (*a*) that the shipment be consigned to the Commissioner, (*b*) that commission as usual at 4 per cent. was payable to the indenting firm by the Commissioner. The order was executed and the goods were accepted by the Commissioner though the shipment was not consigned to the Commissioner as agreed. The Commissioner was aware and it was clear from the terms of the contract that the goods were indented from certain undisclosed principal. Plaintiff as undisclosed principal sued the Attorney-General for a balance sum due on the contract.

Held : (1) That the plaintiff is entitled to maintain this action for the recovery of his claim.
(2) That an undisclosed principal can sue upon a contract made by an agent on his behalf.
(3) That a mixed question of law and fact could not be raised in appeal for the first time.

Case referred to : *Keighley Maxsted & Co. vs. Durant,* (1901) A. C. 240 at 261.

C. Thiagalingam, Q.C., with *C. Renganathan, E. Vannitamby* and *Palasunderam,* for the plaintiff-appellant.

D. Jansze, Crown Counsel, for the defendant-respondent.

NAGALINGAM, A.C.J.

This litigation arises out of a commercial contract entered into by the Government of Ceylon. The Commissioner of Co-operative Development placed an order with Jafferjee Brothers of Colombo for 100 pieces of China silk of 19—20 yards of 120—125 ounces (width 27—28") at 260 dollars per piece ex-factory Hong Kong. To this order the following conditions were annexed :

(*a*) that shipment must be by the first available steamer, and

(*b*) that the shipment be consigned to the Commissioner of Co-operative Development.

The contract was also subject to the following terms : (1) that the bill was to be presented for payment at the office of the Commissioner, and (2) that commission as usual at 4 per cent. on cost and freight was payable by the Commissioner to Jafferjee Brothers. The plaintiff, who executed the order, sued the Attorney-General as representing the Crown for the recovery of a sum of Rs. 841·08 as balance due after giving credit for all previous payments received by him. The plaintiff's case was dismissed by the learned Additional District Judge on two grounds. The first ground was that there was no privity of contract between the plaintiff and the Commissioner of Co-operative Development and that therefore the action was not maintainable. The second ground was that the action was barred by prescription.

I do not think there can be any doubt but that the contract itself was not made between the plaintiff and the Commissioner. While that may be true, the rights of parties cannot be adjudicated upon a simple answer to that question considered in its elementary form. The case was presented on behalf of the plaintiff-appellant in the lower Court on the footing that although the contract was entered into by Jafferjee Brothers with the Commissioner, nevertheless, it was a contract by an agent on behalf of a principal whose name, it was true, had not been disclosed.

The learned Additional District Judge has properly, in one part of his judgement, having regard to all the facts proved, arrived at the conclusion that " the plaintiff was entitled to adopt and ratify the contract made by his agent and sue and be sued on the contract." This finding Counsel for the respondent challenges and contends that the terms of the contract do not indicate that Jafferjee Brothers were acting as agents.

I do not think the contention of learned Crown Counsel is sound. There is ample oral testimony which was uncontradicted and which the learned Judge has accepted which shews that Jafferjee Brothers were carrying on business as indenting agents and export and import agents and that they have had previous commercial transactions with the Commissioner, that the Commissioner at the time that this contract was arranged was aware of the fact that Jafferjee Brothers themselves were not to supply China silk but that they were to indent for them—this fact is clearly deducible from the terms that the price was fixed in dollars and was to be ex-factory at Hong Kong. Further the fact that they were to be indented from certain undisclosed principals is clear from the circumstance that one of the terms of the agreement between the parties was that the Commissioner was to pay commission as usual at 4 per cent. on cost and freight, that is to say, commission which an indenting agent normally gets in the trade. An indenting agent is no more than an agent who is known in law as a *delcredere* agent. It is unfortunate that the learned Judge used the word "ratify" in the passage referred to which has been criticised by Counsel for the respondent as indicating a confusion in regard to the principles underlying the law of undisclosed principal and agent. Subject to this infirmity, I am of opinion that the learned Judge's finding on this part of the case is substantially right.

The learned Judge, however, took the view that the order placed with Jafferjee Brothers was nothing more than an offer made to them, and that there was nothing to shew that Jafferjee Brothers had unconditionally communicated the acceptance of this offer either orally or in writing to the Commissioner. Learned Crown Counsel did not attempt to support this conclusion of the learned Judge. There can be little doubt but that there was a completed contract and that the order was not an offer.

The learned Judge then proceeded to hold that as the goods had not been consigned to the Commissioner there was a breach of one of the conditions which have been set out at the commencement of this judgment. If this view be correct, the Commissioner then should have rejected the goods when they were tendered to him, but on the other hand without any objection he accepted the documents, cleared the goods and took delivery of them. If there was a breach of the terms, then the proper course would have been for the Commissioner either to have rejected the goods or, if he accepted them, to have claimed damages. But he has done neither. The position, then, is that the plaintiff, an undisclosed principal sues upon a contract made by an agent on his behalf. That an undisclosed principal can sue was not challenged at the argument, and it is only necessary to refer to the judgment of Lord Lindley, in the case of *Keighley. Maxsted & Co., vs. Durant*, 1901 A. C. 240 at 261 where he sets out the reason for permitting a party who is not a party to the contract to sue on it :—

> "The explanation of the doctrine that an undisclosed principle can sue and be sued on a contract made in the name of another person with his authority is that the contract is, in truth although not in form, that of the undisclosed principal himself. Both the principal and the authority exist when the contract is made, and the person who makes it for him is only the instrument by which the principal acts. In allowing him to sue and be sued upon it, effect is given, so far as he is concerned, to what is true in fact, although the truth may not be known to the other party."

Mr. Jansze, however, attempted to support the judgment on another ground, namely, that there was no proof that *at the time the contract was entered into* Jafferjee Brothers had in fact the authority of the plaintiff to act for him. This is not a pure question of law; it is a mixed question of law and fact. The fact was never put in issue in the lower Court as to whether Jafferjee Brothers had authority or not to act on behalf of the plaintiff at the time they entered into the contract. In fact, in view of the evidence that the plaintiff is a brother of the partners constituting Jafferjee Brothers in Colombo, it would have been futile to have raised such a point, and besides the judgment of the learned Judge proceeds on the footing that Jafferjee Brothers were in fact the agents of the plaintiff even at the date of the contract.

The conclusion I reach, therefore, is that the plaintiff is entitled to maintain this action.

The only other question is one of prescription and Mr. Jansze conceded that if this view be taken of the first question the plea of prescription cannot be sustained.

I, therefore, set aside the judgment of the District Court and enter judgment for plaintiff as prayed for with costs both in this Court and in the Court below.

SWAN, J.

I agree.

Set aside.

Present : PULLE, J. & CHOKSY, A.J.

ALLES vs. KRISHNAN AND ANOTHER

S. C. No. 407—*D. C. Colombo No.* 19943/*M*

Argued on : 28*th March*, 1952
Decided on : 11*th June*, 1952

Landlord and tenant—Landlord though not actual owner consenting to or acquiescing in improvements by tenant—Owner conveying premises let to another—Attornment and payment of rent to purchaser—Claim for compensation for improvements by tenant against landlord at the time of improvements—Who is liable for the claim.

The 1st defendant let to the plaintiffs as landlord certain premises, owned by his mother, acting to all intents and purposes as the owner thereof. He consented to, or at least acquiesced in improvements effected by the plaintiffs on the footing that he was the owner of the premises let. The improvements resulted in an increase of the Municipal assessment and accordingly the landlord was benefited by way of an enhanced rental. Subsequent to the improvements and at the request of the 1st defendant, the plaintiffs attorned to the 2nd defendant to whom the 1st defendant's mother had conveyed her title.

Plaintiffs claimed compensation for improvements from the 1st and 2nd defendants jointly and severally. At the trial the 2nd defendant, who had in turn disposed of his interests to a third party, was dismissed from the action by consent of parties and the case proceeded against the 1st defendant. The plaintiffs succeeded in the District Court and the 1st defendant appealed.

It was argued for the appellant that it was the actual owner of the premises at the date of the termination of the tenancy and vacation of the premises by the tenant, who is liable to pay compensation and not the landlord who consented to or acquiesced in the improvements.

Held : (1) That the plaintiffs were right in making their claim against the 1st defendant as the actual owner had nothing to do with the plaintiffs and none of them were bound by any agreement expressed or implied between the plaintiffs and the 1st defendant.

(2) That a lessee or tenant cannot claim compensation for improvements effected with the consent or acquiescence of the landlord from a person who does not claim through the landlord but independently of him.

(3) That the plaintiffs are entitled to their claim as upon their attornment to the 2nd defendant, the tenancy that existed between them and the 1st defendant terminated.

Per CHOKSY, A.J.—" Despite the variety of facts and circumstances in the cases I have referred to, the principle that appears to emerge from them is that a lessee or tenant cannot claim compensation for improvements effected with the consent or acquiescence of the landlord from a person who does not claim through the landlord but independently of him ".

Cases referred to : *Costa vs. Abeykoon*, 4 Balasingham's Reports 25.
Saboor vs. Appuhamy (1916) 2 C. W. R. 186.
The Law of Landlord and Tenant in South Africa, 3rd edition, pages 259 to 261.
Scrooby vs. Gordon & Co. (1904) Transvaal Law Reports 937.
Lechoana vs. Cloete and others, (1925) A. D. 536.
Henderson's Transvaal Estates Ltd. vs. Bloom (1911) W. L. D. 88.
Gibson vs. Frost, 13 S. C. 169.
Wijesekere vs. Meegama, (1937) 14 C. L. W. 136.
Soysa vs. Mohideen (1914) 17 N. L. R. 279.
Muttiah vs. Clements (1900) 4 N. L. R. 158.
Mudianse vs. Sellandayar (1907) 10 N. L. R. 209.
Lebbe vs. Christie (1915) 18 N. L. R. 353.
Appuhamy vs. Silva (1891) 1 S. C. R. 71.
Mendis vs. Dawood (1920) 22 N. L. R. 115.
Dharmadasa vs. Marikkar (1926) 7 C. L. Recorder 117.
Appuhamy vs. The Doloswela Tea and Rubber Co. Ltd.
Fernando vs. Menchohamy (1929) 10 C. L. Recorder 124.
De Silva vs. Perasinghe (1939) 18 C. L. Recorder 206.
Samsudeen vs. Rahim (1948) 37 C. L. W. 3.
Justin Fernando vs. Abdul Rahaman (1951) 52 N. L. R. 462.

E. B. Wikramanayaka, Q. C., with *Arulananthan*, for the defendant-appellant.

N. Kumarasingham, for the plaintiffs-respondent.

CHOKSY, A.J.

The plaintiffs filed this action against the defendants for the recovery of a sum of Rs. 4,028·30, as compensation for the improvements effected by them to premises No. 106, College Street, Kotahena, which the plaintiffs had taken on rent from the 1st defendant. The 1st defendant filed answer denying that the plaintiffs effected any improvements; alternatively he pleaded that he was not liable to pay for any improvements. He also took up the position that he collected the rent of the premises, which belonged to his late father, on behalf of his father, and after his death, on behalf of his estate; and that he carried out "the necessary repairs and improvements" on behalf of the estate and heirs of his deceased's father. The 2nd defendant was made a party on the footing that he had purchased the premises from the 1st defendant and therefore compensation was claimed by the plaintiffs against the defendants jointly and severally. The second defendant's defence was a general denial of the plaintiff's claim and a plea of misjoinder of parties and causes of action, a plea which was raised by the first defendant also.

At the commencement of the trial the plaintiff wanted the second defendant dismissed from the action. This was agreed to and the second defendant was dismissed from the case, plaintiffs paying the second defendant Rs. 105 by way of agreed costs. The evidence shows that the second defendant himself had disposed of the property to a third party in or about May, 1948.

At the trial the position taken up by the first defendant was that the premises at no time belonged to him but that they belonged to his father at the time of the commencement of the tenancy in or about June, 1942. His father died in 1946 and therefore the first defendnnt's position was that thereafter he collected the rents on behalf of his father's estate. The plaintiffs' case was that they were not aware at any stage that the first defendant's father was the owner of the premises, and that they did not become the tenants of the first defendant on behalf of his father but that the contract of tenancy was one directly between them and the first defendant and that they continued to be the first defendant's tenants till the first defendant requested the plaintiffs to pay the second defendant the rent subsequent to the second defendant's purchase of the premises whereupon the plaintiffs attorned to the second defendant and continued to pay rent to him. It would appear from the first defendant's evidence that the deceased father had gifted the property to the first defendant's mother by deed of 7th February, 1945, and that it was the mother who later transferred the premises to the second defendant, who in turn disposed of the property to a third party in May, 1948. The receipt issued by the first defendant for a sum of Rs. 100 paid by the plaintiffs as an advance, on 27th February, 1942, has been produced. This does not contain anything to show that the first defendant was acting on behalf of anyone other than himself. The District Judge found upon the evidence that the plaintiffs had never at any time been appraised that the premises did not belong to the first defendant. The "to-let" board which was fixed on the premises before the plaintiffs took them on rent, and which has been produced, has the words "To Let. Apply Alles, Ceylon Wharfage Co., Ltd." The first defendant had been employed at the Ceylon Wharfage Co., Ltd., his father being the late shroff of the Chartered Bank of India. In view of this strong evidence furnished by the receipt for the advance, the "to-let" board, and other evidence in the case, the learned Judge's finding that the first defendant was the landlord of the plaintiffs is correct and cannot be reversed.

It does not appear to have been disputed that after the first defendant's mother's sale to the second defendant the plaintiffs attorned to the second defendant and paid rent to the second defendant thereafter.

The learned Judge has also found that the first defendant consented to, or at least acquiesced in, the plaintiffs effecting the improvements in question. Indeed it was the first defendant who actually signed the Application to the Municipality for sanction to effect the alterations to the premises which alterations constitute the improvements. He has signed the form as the "owner" of the premises.

We therefore find ourselves confronted with a case where, as between the plaintiffs and the first defendant, the latter was to all intents and purposes the owner of the premises which he had let to the plaintiffs as landlord, and that he consented to or at least acquiesced in the improvements intended to be effected by the plaintiffs on the footing—as between the parties—that he was the owner of the premises. As a result of the improvements being effected the Municipal Assessment of the premises was increased with the consequence that the plaintiffs had to pay an increased rental, and that to the first defendant himself. The result therefore is that whilst the tenants had the use and benefit of the improvements themselves, their landlord also reaped the benefit of the improve-

ments in the shape of an enhanced rent. The question that arises for consideration, therefore, is whether the plaintiffs, being tenants, are entitled to claim compensation for the improvements effected by them from the person who was their landlord at the time the improvements were effected, or should claim them from the actual owner of the premises to whom they had later attorned.

It is of course not necessary that the owner himself should be the landlord. The relationship of landlord and tenant can exist between the tenant and a third party who is not the owner of the premises let so long as he fulfils the obligations of a landlord by putting his tenant into possession—*14 Ceylon Law Recorder 210.* He will then be the person entitled to receive the rent during the period of the tenancy.

It was conceded in the lower Court that the tenant is not entitled to a *jus retentionis* for the improvements effected by him. Even a lessee under a notarial lease is not entitled to a *jus retentionis*—26 N. L. R. 97. A lessee is neither a *bona fide* possessor nor a *male fide* possessor. He certainly has not the *possessio civilis* and therefore his claim for compensation must depend on his possession as a lessee, because he is not such a "possessor" as is contemplated in the context of a claim for compensation for improvements—13 N. L. R. 193. In *Costa vs. Abeykoon*, 4 Balasingham's Reports 25, this Court has held that a tenant is not entitled to a *jus retentionis* even for improvements made by agreement with his landlord in the absence of an express or implied term in the agreement giving him a *jus retentionis*—see *Saboor vs. Appuhamy* (1916) 2 C. W. R. 186. The tenant in that case, however, was in fact the lessee under a lease. Whatever may be his position in regard to a tacit hypothec it is clear on the authorities that a tenant is entitled to claim compensation for improvements effected by him during the tenancy provided those improvements had been effected by him either with the consent or acquiescence of the landlord. That claim however can only be made after the tenancy has expired and the tenant has vacated the premises. The topic is discussed, among other authorities, by Wille in his standard work on *The Law of Landlord and Tenant in South Africa.* 3rd edition, pages 259 to 261. Whilst it is true that Wille relies, for his statement, on the placaats of 1658 and 1696 he also relies on decisions of the South African Courts to that effect.

Mr. Wikramanayaka, while not contesting the proposition that a tenant would be entitled to compensation for improvements effected with the consent or acquiescence of the landlord strenuously pressed upon us the point of view that it was the actual owner of the premises at the date of the termination of the tenancy and vacation of the premises by the tenant who is liable to pay such compensation and not the landlord who consented to or acquiesced in those improvements. We were told that there is no direct authority on the point amongst the local decisions. The case of *Scrooby vs. Gordon & Co.*, (1904) Transvaal Law Reports 937 was relied on by him. The question which was formulated as being the one coming up for determination in that case was whether a lessee was entitled, on the termination of the lease, to be compensated by the lessor for the value of the improvements effected before the termination of the lease, if before the termination of the lease the property had been sold by the lessor to a third party. The Court held that it was established law in South Africa that in the absence of a special agreement, a lessee who annexes materials to the soil retains his property in those materials during the tenancy, that he can dissever and remove those materials, before the expiry of the lease, provided he can do so without serious damage to the land; that at the expiry of the lease the owner of the land at that date becomes the owner of the materials; that the lessee cannot retain the leased property after the expiration of the tenancy, but can recover, as compensation, the value of the materials annexed by him to the soil with the landlord's consent. The Court then put itself the question as to whether the tenant could enforce that claim for compensation against the person who was the owner at the time when the improvements had been effected or against the person who is the owner at the time when the lease terminates and the lessee has to quit possession. The Court was of the view that it is the owner at the time of the termination of the lease who is the person against whom the lessee could assert his right to compensation, principally because where a property which is sold is subject to a lease it is acquired by the purchaser subject to the lessee's rights. The Court held that the lessee has the right to continue in occupation of the premises as against the purchaser, during the balance period of the lease, subject to the due observance by him of all the terms and conditions of the lease, and also the right to receive compensation, on its expiry, in respect of the materials annexed to the soil by the lessee with the consent of the original lessor. It was pointed out that this obligation of the purchaser to pay compensation in such circumstances is founded on the broad-based equitable doctrine of Roman-Dutch Law, which is capable of infinite adaptation and

application to the varying circumstances and situations that arise under the continuously changing conditions of civilization, that "no man shall enrich himself at the expense of another". The person who appeared to the Court to be enriched was the person who was the owner of the property at the termination of the lease, owing to the fact that it was at the termination of the lease, and not earlier, that the materials ceased to be the property of the lessee (who has not removed them earlier) and became the property of the owner of the soil.

The case of *Lechoana vs. Cloete and others*, (1925) A. D. 536 was also relied on in support of that proposition. In the course of his judgment De Villiers, A.J., cites the case of *Hendersons Transvaal Estates Ltd., vs. Bloom* (1911) W. L. D. 88 as deciding that a person who *bona fide* occupies land either under a mistaken belief that he is the tenant thereof, or in the expectation of a lease being granted to him, (the owner consenting to such occupation with the intention of granting him a lease), is a tenant-at-will and that upon the termination of his occupation such person is entitled to compensation for the value of the materials standing on the premises and which the tenant has annexed to the soil with the consent of the owner. The report of *Hendersons Transvaal Estates Ltd., vs. Bloom* is not available but it appears to be the case of a claim for compensation against the very person who gave his consent for the occupation. *Lochoana's case* was also concerned with a claim for compensation being made against the very body of persons (viz., the Mission Society) with whom the defendant there had dealt, and not with any purchaser from the Mission Society. That case therefore is not of such assistance as is the case of *Scrooby vs. Gordon & Co.* (Supra).

The case which comes closest to the present case is that of *Gibson vs. Frost*, 13 S. C. 169 which is referred to and distinguished in *Scrooby vs. Gordon & Co.* (supra). In *Gibson vs. Frost* the defendant rented the house to his daughter the plaintiff, and boarded with her, paying for his board. She put up a fence with his knowledge and without his objection. He gave her to understand that that she was to get that house after his death. But in May, 1895, he transferred the property to his son. Despite the transfer he continued to receive the rent and treat her as his tenant whilst she regarded him as the landlord. In December, 1895, he asked her to vacate the premises at the end of January, 1896, as he required them for his own use. She agreed to do so but claimed compensation for the improvements and said that she would remove them if he refused to pay for them. Then the defendant for the first time said that his son was the owner and that she could not remove the improvements. She accordingly left the premises and sued her father for compensation. Her claim succeeded on the footing that she had made improvements with the defendant's consent. It was argued contra that she could recover compensation only from the person who was the owner at the date of the termination of her tenancy because the law reserves a tacit hypothec in favour of the lessee for such compensation. After considering the effect on tacit hypothecs, of a certain Act, the Court considered the question even on the footing that the tacit hypothec continued in favour of the tenant despite the Act. The Court held that merely because the tenant had a tacit hypothec it would not follow that the tenant lost her personal right of action against the landlord with whom she had entered into the original contract of lease, and who consented to the materials being annexed before he parted with the ownership of the property, and who during the subsistence of the tenancy had prohibited the removal. That personal right, it was held, she still enjoyed, whatever real rights she might retain in respect of the land itself. It may be that the landlord would have had a good defence if he had proved that, after he ceased to be the owner, and before the termination of the tenancy, the tenant had negligently failed to remove the materials, but that defence could not have been raised in that case as he had prohibited the removal. On the evidence it was clear that when the tenancy expired the defendant still regarded himself, and was regarded by the plaintiff, as the landlord. He gave notice to quit, he received the rents, and he prohibited the removal of the materials. Buchanan, A.J., said that it did not lie in the defendant's mouth to set up a transfer as, to the very end, he acted as the landlord between the plaintiff and himself and that it would not be equitable to allow the defendant to shelter himself behind the transfer. It was pointed out that the plaintiff's position was further strengthened by the fact that although the defendant parted with the ownership he still retained a usufructuary interest in the land.

It would be observed that there was a legal nexus between the landlord (the defendant's father) and his vendee, who could be said to have bought the property subject to all claims against the former owner. Nevertheless, the Court held that although the tenant may have real rights as against the owner of the land by

virtue of the transfer of the legal estate in it by her landlord to the purchaser, she still had her personal claims against the former owner her father. In the present case there is no legal nexus between Alles the defendant and either his mother or the second defendant as neither of these two got title through Alles but independently of him; also, there was no consent or acquiescence by the owner to any of the improvements all of which were effected on the footing that, as between the plaintiffs and the defendant, the defendant was the owner of the demised premises.

There are local cases in our own law reports, in addition to the case of *Wijesekere vs. Meegama*, (1937) 14 C. L. W. 136, which was cited to the learned District Judge, which have a bearing on the questions before us. That case mainly dealt with the classes of persons entitled to the *jus retentionis*—a question which does not arise in this case.

In *Soysa vs. Mohideen* (1914) 17 N. L. R. 279 a bench of three Judges held that a lessee of one of the fiduciaries who had agreed to pay at the termination of the lease half the value of such improvements as the lessee may effect, was not entitled to claim compensation for those improvements as against the *fideicommissaries*. The reason for the decision was that the *fideicommissary* claims on a title independent of the fiduciary. Lascelles, C.J., explained that in the earlier case of *Muttiah vs. Clements* (1900) 4 N. L. R. 158 and *Mudianse vs. Sellandayar* (1907) 10 N. L. R. 209 lessees were granted compensation as against successors to the original lessors in view of the contractual relation between these successors in title, against whom compensation was claimed, and their predecessors in title, namely the persons with whose permission improvements had been effected. De Sampayo, J., further explains that Clements was granted compensation against the trustee appointed under the Buddhist Temporalities Ordinance, even though Clements had effected improvements under an informal lease taker from the incumbent whose rights ceased upon the appointment of a trustee under the Buddhist Temporalities Ordinance, because the trustee appointed under the Ordinance had, after his appointment, himself consented to Clements improving the property. De Sampayo, J., also observes that in Clements' case the incumbent was in law competent to deal with that temple property at the time he executed the informal lease. In the present case there is no evidence that either the defendant's mother or the second defendant approved of the improvements; indeed, all the evidence is to the contrary. Moreover, Alles the defendant was in no sense legally competent to deal with the property he rented as was the case with the incumbent in Clements' case. De Sampayo, J., refers to *Scrooby vs. Gordon & Co., Ltd.*, (supra) and *Mudianse vs. Sellandayar* (supra) and shows that both decisions are capable of explanation on the footing that a successor-in-title to the lessor, such as a purchaser from him, becomes entitled to the rights and liable to the obligations of the lessor. That of course would be in a case where the lessor is himself the vendor so as to make the purchaser a legal successor-in-title to the lessor. The position in the present case is entirely different as neither the defendant's mother nor the second defendant were privies or successors of Alles the landlord so as to saddle either the mother or the second defendant with the legal liability to compensate the plaintiffs for the improvements. Lascelles, C.J., states that a lessee's rights to compensation are derived from considerations wholly different to those applicable to "*bona fide* possessors" as lessees do not come within the category of either "*bona fide* possessors" or "*male fide* possessors" as those terms are understood in the context of claim to compensation for improvements. De Sampayo, J., makes it clear that a lessee's right to compensation is a right *resulting from contract*, which cannot be enforced as against a person who is not a party to the contract. Applying that basis to the present case neither the defendant's mother nor the second defendant nor the subsequent purchaser from the second defendant were parties to the contract between Alles the defendant and the plaintiffs, nor were they in any sense of the term successors-in-title to Alles so as to be bound by any obligations of Alles. In these circumstances the plaintiffs could not make their claim to compensation against any party other than Alles who alone was the other contracting party.

Lebbe vs. Christie (1915) 18 N. L. R. 353 was a case where a Kandyan widow leased (without the Court's sanction) a land belonging to her husband over which she had only a life interest. That lease was accordingly not operative beyond the period of her life and could not bind her children by her deceased husband. Her lessee was therefore held not to be entitled to compensation for improvements as against the child of the widow by her deceased husband. Ennis, J., who dissented from the view of Wood Renton, C.J., and Shaw, J., held that a distinction should be made between the case of a lessee who had not been allowed to possess for the full term of

the lease and a lessee who had possessed for the full term. But he too referred to the right of a lessee to compensation as a right accorded to him as a matter of contract, and then went on to state the equitable considerations applicable to a case where the lessee's term of possession was cut short and what the compensation should be in such a case. In his view *Soysa vs. Mohideen* (supra) decided that whatever rights a lessee might have against his lessor, the lessee had no right to claim compensation against a party who derived title from a source other than the lessor, in the absence of an assignment by the lessor to the lessee of any rights that the lessor may have to claim the benefit of the lessee's improvements as against the party ultimately entitled to the land. Shaw, J., explained that the doctrine of enrichment was limited to compensating a person who is in possession of another's property, *bona fide*, and in the belief—based on reasonable grounds—that it is his own. That invests his possession with the character implied in the expression "*bona fide* possession" and attaches an equity in his favour. Were the doctrine not so limited it would appear to be unjust to an owner of land that he should be called upon to pay compensation to any and every person who may have effected so-called improvements on his property without any reference to him and without even so much as his acquiescence. I have already made it clear that the limited right of a lessee to claim compensation for improvements is not based on the character of his "possession" which is neither *bona fide* nor *male fide*, but on contract. The plaintiffs in the present case therefore cannot be referred to the second defendant or his successors on the principle that the latter should not be enriched at the expense of the plaintiffs. Those parties had nothing to do with the contract (express or implied) on which improvements were effected, nor have the plaintiffs that "*bona fide*" possession which would have entitled them to claim compensation against the true owner on the doctrine of enrichment.

Bertram, C.J., who discussed this question of a lessee's right to compensation in his judgment more fully in the Doloswella case—23 N. L. R. 219 and 25 N. L. R. 267—does not reach a contrary conclusion, in view of the two cases ot *Soysa vs. Mohideen* (supra) and *Lebbe vs. Christie* (supra). Garvin, J., observed that no authority had been cited to show that an action, apart from contract, was allowed to a lessee (in respect of his claim for compensation for improvements) as against a person who established a claim to the land by a title adverse to and independenf of the lessor.

Appuhamy vs. Silva (1891) 1 S. C. R. 71 is a case where the purchaser from the owner of the land during whose ownership the improvements had been effected by the monthly tenant, was held liable to pay compensation to the tenant on the footing that the purchaser was the legal successor-in-title to the former owner during whose time the improvements had been effected. Consistently with this position Ennis and De Sampayo, J.J., held in *Mendis vs. Dawood* (1920) 22 N. L. R. 115 that the *fideicommissaries* were not bound by the agreement for compensation entered into between some of the fiduciaries and the person who had erected buildings on the land in pursuance of that agreement with those fiduciaries. One of the grounds of the decision was that the *fideicommissaries* were not the successors to any of the parties to that agreement, as they derived their title from the will which created the *fidei commissum* and not by succession to the fiduciaries who were parties to the agreement.

Dharmadasa vs. Marikkar (1926) 7 C. L. Recorder 117 decided that a lessee (or assignee) cannot claim compensation for improvements effected in terms of his lease, against a person who establishes a superior right to the land than of his lessor. No *fidecommissum* was involved in the case as the persons who claimed to be entitled to possession of the land free of any

claims to compensation were the children of a Kandyan by his mistress the latter of whom had executed the lease in question during the time when the children were minors. The decisions in *Soysa vs. Mohideen* (supra), *Lebbe vs. Christie* (supra) and *Appuhamy vs. The Doloswela Tea and Rubber Co., Ltd.*, were applied. *Fernando vs. Menchohamy* (1929) 10 C. L. Recorder 124 was also a case where the principle that a lessee is not entitled to compensation as against the real owner who vindicates his title as against the lessor, was reaffirmed.

Finally in *De Silva vs. Perasinghe* (1939) 18 C. L. Recorder 206, Soertsz, A.C.J., with whom De Kretser, J., agreed, had to consider a claim for compensation for necessary improvements effected by a tenant with the landlord's consent. The Acting Chief Justice compares and contrasts the position of improving tenants with *bona fide* and *male fide* possessors who effect improvements, and states that a lessee's or tenant's position is equiparated to that of a *bona fide* or *male fide* improver according as to whether he has improved the property with or without the consent of the landlord, and points out that whatever controversy there may be amongst the Roman-Dutch Law writers on the question whether a lessee or tenant is entitled to claim compensation from any party seeking to recover possession from him, or only from his lessor or landlord, the matter had been set at rest so far as Ceylon is concerned by the two divisional bench decisions in *Soysa vs. Mohideen* (supra) and *Lebbe vs. Christie* (supra). In the case before him the plaintiffs were entitled to the property in question by right of inheritance from their father, a Kandyan. The property was acquired property and so the plaintiffs' mother was entitled to enjoy the income from it in order to maintain herself during her life. During the period of that right the defendant entered into occupation of the premises which he improved. Those improvements had been effected without the consent of the plaintiffs' mother. According to the view taken in South Africa the defendant's position there was similar to that of a negotiorum gestor and he would be compensated *quasi-ex-contractu*; but as between the plaintiffs and the defendant there was no contract whatsoever, express or implied or constructive. The plaintiffs got their title quite independently of their mother and therefore it was held that the defendant could not claim compensation as against the plaintiffs, whose source of title was by inheritance from their father.

Despite the variety of facts and circumstances in the cases I have referred to, the principle that appears to emerge from them is that a lessee or tenant cannot claim compensation for improvements effected with the consent or acquiescence of the landlord from a person who does not claim through the landlord but independently of him. In the present case there cannot be any question but that the title of the second defendant was quite independent of and not at all derived from the defendant Alles and therefore the plaintiffs could not have claimed any compensation for their improvements from the second defendant whose predecessor-in-title, the first defendant's mother, also had nothing to do with the improvements and neither of whom were bound by any agreement expressed or implied between the plaintiffs and the first defendant. Both of them were perfect strangers to and had nothing to do with the plaintiffs and neither of them were bound by any acts or conduct of the first defendant. The plaintiffs were therefore in my opinion right in making their claim to compensation for improvements as against the first defendant.

It was argued that in any event a lessee or tenant can claim compensation only at the termination of the tenancy and upon his quitting the premises. It was said that here the plaintiffs were still in occupation of the premises at the date of this action and therefore not entitled to claim compensation. But there is evidence that

the plaintiffs attorned to the second defendant who thereafter continued to receive rent from the plaintiffs. I am of the view that upon the attornment the tenancy that existed between the plaintiffs and the first defendant terminated. One may even say that there was a notional vacation of the premises as far as the first defendant was concerned, and a resumption of possession under a new tenancy as between the plaintiffs and the second defendant. I would accept the view of Basnayake, J., in *Samsudeen vs. Rahim* (1948) 37 C. L. W. 3, where it was held that the status of landlord and tenant that existed between the vendor, who was the landlord, and the defendant, who was the tenant, terminated by the notice which the landlord had sent to the defendant upon his selling the premises, and that that result was brought about even though the defendant ignored the notices he received from both the landlord and the purchaser. That a new tenancy comes into existence upon the attornment is also apparent from the judgment of Gratiaen, J., in the case of *Justin Fernando vs. Abdul Rahaman* (1951) 52 N. L. R. 462.

The conclusion I have arrived at is that the plaintiffs were correctly awarded compensation as against the first defendant and the appeal should therefore be dismissed with costs.

PULLE, J.
I agree.

Appeal dismissed with costs.

Present : GRATIAEN, J & PULLE, J.

THE ARCHBISHOP OF COLOMBO vs. DON ALEXANDER

S. C. No. 168—*D. C. Colombo No.* 4483/*L*

Argued on : 24th January and 4th March, 1952.
Decided on : 24th March, 1952.

Fidei commissum—*Plaintiff's claim to property under a clause of last will—Clause alleged to create* fidei commissum *binding four generations—Last will with three subsequent codicils admitted to probate—Contents of codicils not proved by plaintiff—Principles of construction of a will creating* fidei commissum—Jus accrescendi.

The plaintiff claimed title to a share in a property which the defendant and his predecessors had possessed *ut dominus* for over half a century. He based his claim on the provisions of a clause in the last will of one Saviel Dias dated 30th August, 1807, which, he submitted, created in respect of the property " a valid *fidei commissum* in perpetual succession binding on (the immediate devisees) and then descendants to the fourth degree of succession ", thereby defeating defendant's prescriptive title. In the testamentary proceedings of Saviel Dias' estate in 1811, the last will together with three subsequent codicils had been admitted to probate, but in the present action only the third codicil (the other two codicils being missing) was produced without a translation for the limited purpose of identifying the will.

Clause 21 of the will is as follows :—

> " The testator bequeaths *beforehand* to his three children (name) and likewise to the two children of the testator's deceased daughter Louisa Dias, named Francisca Waniappu and Louisa Wanniappu.....(the property is here described).....*with the wish that not only must the said portion of the garden and the paddy field remain unsold in order that all his abovementioned children and grandchildren might enjoy the profits therefrom, to wit :* a quarter each by the three first named ones and one quarter by the two last named ones or one-eighth of the whole by each of the two, *but also if one of the said children or grandchildren of the testator should happen to die without leaving lawful descendants behind, then his or her share must devolve to the testator's other children and grandchildren who are alive.*"

On behalf of the plaintiff it was submitted (*a*) that the testamentary direction that the property must " remain unsold " amounted in this context to a real (as opposed to a personal) prohibition against alienation, indicating an intention that the property should never pass out of the family of the immediate devisees and their lawful descendants, and (*b*) that in accordance with the principles laid down by the Privy Council in *Tillekeratne vs. Abeyasekere* (2 N. L. R. 313) there was a single bequest to five persons of a property which was intended, not expressly but by necessary implication to be burdened with a *fidei commissum* in favour of a successive series of their descendants.

On behalf of the defendant it was submitted (*a*) that the will does not represent the complete testamentary instrument because the plaintiff's failure to prove the contents of the codicils made it impossible for a Court of law to decide that Saviel Dias' final testamentary disposition of the property was exclusively contained in the provisions of Clause 21 of the will ; (*b*) that in any event Clause 21 did not create a valid *fidei commissum* and certainly not a multiplex *fidei commissum*.

Held : (1) That in the absence of proof by the plaintiff of the contents of the codicils admitted to probate, it cannot be concluded that Clause 21 substantially expresses the final testamentary intentions of Saviel Dias as to the devolution of the property, and therefore the plaintiff's claim fails *ab initio*.

(2) That Clause 21 did not create a valid *fidei commussim* and that the testator intended the appropriate shares in the property to vest absolutely, and without further restrictions, in each institute (or his substitute, as the case may be).

(3) That the words " wish ", " remain unsold ", in Clause 21 either by themselves or in relation to the rest of the language do not afford convincing evidence of an underlying intention to conserve the property perpetually for the benefit of succeeding generations of the family concerned, on the contrary the primary object of the prohibition, is expressly to ensure the enjoyment of the profits by the five persons named as devisees and *no one else*.

(4) That the principle of *jus accrescendi* does not apply because there is a clear disposition by the testator of a specific share to each of the named institutes indicating very clearly a *separation of interests* which immediately raises a presumption against accrual.

(5) That even if it be legitimate to interpret the words under consideration as creating a *fidei commissum* the will unequivocally provides for one grade of *fidei commissaries*. Clause 21 does not create " a recurring or multiplex *fidei commissum* circulating as it were throughout the family.

Authorities cited : *Douglas-Menzies vs. Umphelby* (1908) A. C. 224.
Hellier vs. Hellier (1884) 9 P. D. 237.
Cutto vs. Gilbert 9 Moo. P. C. 131.
Dickinson vs. Stidolp 11 C. B. (N. S.) 354.
Sugden vs. Lord St. Leonards 1875—6 L. R. 1 P. D. 154.
Tillikeratne vs. Abeysekera 2 N. L. R. 313.
Gordon Bay's Estates vs. Smuts et al S. A. (1923) A. D. at p. 165.
Lint vs. Zipp (1876) Buch. 181.
Ex Parte Zinn (1941) W. L. D. 7.
Nel vs. Nel's Executors 8 S. C. 189.
De Jager vs. De Jager 25 S. C. 703 at p. 712.
Brits vs. Hopkinson (1923) A. D. 492.
Voet, 28-6-3 ; 36-1-28.
Van Wyk's Trustee vs. Van Wyk 13 S. C. 478.
Ex Parte Bosch (1943) C. P. D. 369.
Ex Parte Kops and others (1947) 1 S. A. L. R. 155.
Voet, 36-1-72 ; 28-6-3 ; 36-1-28.
Steyn, Wills, p. 61.
T. Nadarajah, Fidei Commissum, p. 304 (Note 20).

N. E. Weerasooriya, Q.C., with *G. T. Samarawickreme* and *Vernon Wijetunge*, for the defendant-appellant.

H. V. Perera, Q.C., with *C. Thiagalingam, Q.C.*, and *J. M. Jayamanne*, for the plaintiff-respondent.

GRATIAEN, J.

This is an appeal by the defendant, who is the Archbishop of Colombo, against a judgment of the Additional District Judge of Colombo declaring the plaintiff entitled to an undivided 1/6 share of certain premises in Colombo hereafter described for convenience as " the Madampitiya property ".

The plaintiff claimed undivided shares in the Madampitiya property as well as in certain other premises under a deed of purchase in his favour dated 3rd November, 1941. His claim against the defendant in respect of the other premises has been rejected by the learned trial Judge and does not arise for consideration on the present appeal.

Admittedly the defendant, and those under whom he claims, had continuously possessed the entirety of the Madampitiya property *ut dominus* for over half a century, and under normal circumstances the plaintiff's claim would for this reason be barred by the provisions of section 3 of the Prescription Ordinance. He seeks, however, to defeat this plea of prescription by tracing the legal title of his vendors to the provisions of clause 21 of the " last will and testament " P1 dated 30th August, 1807, of a gentleman named Saviel Dias who thereby, in the plaintiff's submission, created in respect of the Madampitiya

property " a valid *fidei commissum in perpetual succession* binding on (the immediate devisees) *and their descendants to the fourth degree of succession* ".

Mr. Weerasuriya concedes that if the plaintiff's legal title is in fact derived from clause 21 of the will P1 *and* if the provisions of clause 21 did create a valid *fidei commisum* which was effectual under the Roman Dutch Law for four generations, the defendant's plea of prescription must fail by a very short period of time. Mr. H. V. Perera admits, on the other hand, that the plaintiff's claim is very clearly barred by prescription unless a multiplex *fidei commisum* such as his client contends for had been created by clause 21. It therefore follows that the present appeal must depend upon the applicability and the proper interpretation of clause 21 of the last will P1.

The defendant's position may be summarised as follows :—

(1) that P1 does not represent *the complete testamentary instrument* in respect of which probate issued when Saviel Dias Pulle died in 1811, because P1 *together with three subsequent codicils* had been admitted to probate in testamentary action No. 1804 of this Court ; and that the plaintiff's failure to prove the contents of those codicils makes it impossible for a Court of law to decide that Saviel Dias' *final* testamentary disposition of the Madampitiya property was exclusively contained in the provisions of clause 21 of P1 ;

(2) that, *in any event*, clause 21 did not create a valid *fidei commissum* of any kind, and certainly not a multiplex *fidei commisum*, effectual under the Roman Dutch Law for four generations, such as is admittedly essential to combat the defendant's plea of prescription in these proceedings.

With regard to the first of these contentions, it is manifest, upon an examination of the proceedings in the testamentary proceedings of 1811 relating to Saviel Dias' estate (P9), that after the execution of P1 he had executed as many as three codicils two of which are now stated to be missing. The third codicil, written in the Dutch language, was produced at the present trial without a translation as part of plaintiff's case *for the limited purpose of identifying the carlier will P1* by reference to certain markings on the documents concerned. In the result, the contents of the three codicils have not been proved even by secondary evidence.

In this state of the evidence, can it be said that the plaintiff has satisfactorily established that clause 21 of the last will P1 represents the final testamentary disposition of Saviel Dias in respect of the Madampitiya property ? " When a man leaves not one but several testamentary writings, it is the aggregate or the nett result that constitutes his will, or, in other words, the expression of his testamentary wishes. The law, on a man's death, finds out what are the instruments which express his last will. If some extant writing be revoked or is inconsistent with a later testamantary writing, it is discarded. But all that survives this scrutiny forms part of the ultimate will or effective expression of his wishes about his estate." *Douglas-Menzies vs. Umphelby* (1908) A. C. 224.

It is important to bear in mind that this action is concerned with the investigation of title to immovable property and not with a preliminary application for probate in respect of an estate of which that property had formed a part. Had this been the original testamentary proceeding where the later codicils were proved to be missing at the time when probate was applied for by Saviel Dias' executors, it may well be that the Court would (in the absence of clear proof that the terms of P1 had been revoked or altered by a subsequent testamentary instrument) have been justified in admitting P1 alone and in its entirety to probate. *Hellier vs. Hellier* (1884) 9 P. D. 237. For P1, at any rate at the time of its execution, did completely express the testamentary wishes of Saviel Dias, and the burden of proving that all or any of its provisions had been subsequently revoked by a missing will or codicil would therefore have been on the party who alleged " a difference of disposition ". *Cutto vs. Gilbert*, 9 Moo, P. C. 131. As Williams, J. declared in *Dickinson vs. Stidolp* 11 C. B. (N. S.) 354, " a subsequent will (or codicil) is no revocation of a former one if the contents of the subsequent will (or codicil) are not known—the law is the same even if the later will be expressly be found to be different from the former, *provided it be unknown in what the difference consists* ".

To my mind, however, the present problem stands on an entirely different footing. The stage of admitting the complete and final testamentary instrument of Saviel Dias to probate has long since passed, and all that we know is that probate had issued in 1911 on the basis that the testator's final wishes were expressed not in P1 alone but in four testamentary writings of which P1 forms only a part. As I understand the problem of interpretation which is now before us, our duty

is to ascertain the comprehensive effect of the judicial order for probate entered in the testamentary proceedings in 1911, and I find it impossible, upon the evidence before me, to say one way or the other whether the terms of clause 21 of P1 were revoked, altered or left unaffected by the subsequent codicils which had also been admitted to probate as expressions of Saviel Dias' testamentary intentions.

As far as the present action is concerned, I take the view that the burden was on the plaintiff to prove that the Madampitiya property which formed part of Saviel Dias' estate had upon his death devolved on certain specified devisees subject to the conditions laid down in clause 21 of P1. *If we regard P1 and the subsequent codicils, read together, as a single tsstamentary instrument which had been admitted to probate* I do not see how the plaintiff could have succeeded except by proof, at least by secondary evidence, that the missing parts of the " aggregate or nett result " of the testamentary instruments admitted to probate did not alter the provisions of clause 21 which, in the present state of the evidence, only reveals an incomplete picture. In the absence of such proof, I cannot conclude that clause 21 *substantially expresses the final testamentary intentions of Saviel Dias as to the devolution of the Madampitiya property.* Vide *Sugden vs. Lord St. Leonards*, 1875-6, L. R. 1, P. D. 154. If this be so, the plaintiff's claim fails *ab initio*, but, should I be wrong in so deciding, I shall proceed to consider whether in any event the provisions of clause 21 can properly be construed as having created a multiplex *fidei commissum*.

Clause 21, on which the plaintiff relies, is in the following terms :—

> " The testator *bequeaths beforehand* to his three children Maria Dias wife of Philippu Brito, Anthony Dias and Nicholas Dias and likewise to the two children of the testator's deceased daughter Louisa Dias, named Francisca Waniappu and Louisa Waniappu.....(the property is here described).....*with the wish that not only must the said portion of the garden and the paddy field remain unsold in order that all his abovementioned children and grandchildren might enjoy the profits therefrom*, to wit : a quarter each by the three first named ones and one-quarter by the two last named ones or one eighth of the whole by each of the two, *but also if one of the said children or grandchildren of the testator should happen to die without leaving lawful descendants behind, then his or her share must devolve to the testator's other children and grandchildren who are alive.*"

The learned District Judge took the view that this clause created " a valid *fidei commisum* in favour of the lawful descendants of the devisees for the full term allowed by law, that is, for four generations ". Unfortunately, the grounds for this decision have not been fully elucidated.

The main submissions on behalf of the plaintiff in support of the judgment under appeal were (*a*) that the testamentary direction that the property must " remain unsold " amounted in this context to a *real* (as opposed to a personal) *prohibition* against alienation, indicating an intention that the property should never pass out of the family of the immediate devisees and their lawful descendants ; and (*b*) that, in accordance with the principles laid down by the Privy Council in *Tillikeratne vs. Abeysekera* 2 N. L. R. 313, there was a single bequest to five persons of a property which was intended, not expressly but by necessary implication, to be burdened with a *fidei commissum* in favour of a successive series of their descendants.

It is convenient at the outset to examine the general principles upon which a Court of law should approach the question whether any particular will creates a *fidei commissum*, and if so, whether such *fidei commissum* operates as a recurring or multiplex *fidei commissum*. Upon a consideration of the authorities, the cardinal rules which govern every case are to the following effect :—

(1) the main duty of the Court is to ascertain the intention of the testator as expressed in the instrument, and " to this rule, all other canons of construction must give way ". *Voet* 36-1-72; *Gordon Bay's Estates vs. Smuts et al*, S. A. (1923) A. D. at page 165. (For this reason, "a decision as to the construction of one instrument is not of much assistance in construing another, the language of both not being the same ") ;

(2) in case of doubt or obscurity, the construction should be adopted which imposes the least burden on the instituted heir ; when, therefore, a person is instituted as heir, a clear expression of the testator's intention is required to deprive him of or diminish his rights as such heir, so that if other persons are mentioned in the instrument as heirs " *upon his death* ", the fair construction is that they are to be substituted as his heirs only if the instituted heir *predeceases* the testator. *Lint vs. Zipp* (1876) Buch. 181. In other words there is a recognised presumption in favour of direct and against *fidei commissary* substitution whenever there is a reasonable doubt as to the testator's intention. (This does not mean, of course, that mere difficulty in ascertaining such intention would necessarily create such a doubt, *ex parte Zinn* (1941) W. L. D. 7).

(3) even if the presumption in favour of direct substitution be removed by a clear expression of the testator's intention to that effect, the Court should incline to the view which imposes the least burden or restrictions on alienations on the *fidei commissary* substitute, because there is an additional presumption, in the absence of a clear intention to the contrary, against a multiplex *fidei commissum* created for the benefit of succeeding generations. *Nel vs. Nel's Executors*, 8 S. C. 189; *De Jager vs. De Jager* 25 S. C. 703 at page 712 and *Brits vs. Hopkinson* (1923) A. D. 492.

I now proceed to examine the language of clause 21 in the light of these cardinal principles, and in doing so I am prepared to assume in favour of the plaintiff that the word "wish" which qualifies the bequest to the testator's three children and two grandchildren connotes in its context an imperative direction rather than a merely precatory exhortation. Moreover, the direction that the property should "remain unsold" does, in a sense, impose a *real* prohibition against alienation, but only for the purposes and to the extent indicated in clause 21. I find it impossible, however, to accept the further submission that these words either by themselves or in relation to the rest of the language afford convincing evidence of an underlying intention to conserve the property *perpetually* for the benefit of succeeding generations of the family concerned. *Nadarajah on fidei commisum*, page 104. On the contrary, the primary object of the prohibition is expressly to ensure the enjoyment of the profits by the five persons named as devisees *and no one else*. Indeed, it is possible (although I do not decide) that the direction against a sale of the property was addressed merely *to the executors* of the will requiring them to avoid, if possible, a sale in the course of administration *for the payment* of debts which would thereby frustrate the "pre-bequest". For the disposition "beforehand" in clause 21 is a "pre-bequest" which takes priority over other dispositions, *vide Steyn on Wills*, 61.

To pass on to the next submission urged on the plaintiff's behalf, I am quite unable to agree that the words of clause 21 provide scope for the operation of the *jus accrescendi* principle elucidated in *Tilliyeratne vs. Abeyesekere* (supra). For in the joint will which was there interpreted "the bequest was not in the form of a disposition of a share of the whole to each of the institutes, but of *a gift of the whole to the institutes jointly, with benefit of successorship, and with substitution of their descendants*". In the present case, by way of contrast, there is a clear disposition by the testator of a specific share to each of the named institutes, indicating very clearly *a separation of interests* which immediately raises a presumption against accrual. I find no indication in other parts of the will sufficient to negative this presumption—*vide* the authorities cited in *Nadarajah* p. 304 (Note 20).

There remain for consideration the words "but also if one of the said children or grandchildren should happen to die *without leaving lawful descendants* behind, then his or her share must devolve to the testator's other children and grandchildren". This is the only passage in which express reference is made to "the lawful descendants" of the devisees. The interpretation relied on by the defendant is that these words merely provide for the *direct* substitution of an heir should any particular devisee *predecease* the testator—in which event the substituted heir would be *either* a "descendant" (if alive) of the first-named institute *or*, should no such "descendant" be available to be substituted, the other named institutes who are still alive. There is much to be said for this view. I appreciate that gramatically the words "should happen to die" are not necessarily limited in point of time, but the South African Courts, in construing similar words, have often applied the presumption in favour of direct as opposed to *fidei commissary* substitution. For instance, in *Lint vs. Zipp* (supra) a testator nominated his son to be his "sole and universal heir, *and on his death his lawful descendants by representation*". De Villiers C.J. held that, upon the son being alive to accept the inheritance, his descendants could not thereafter claim the property by right of *fidei commissary* succession, *Voet.* 28-6-3 *and* 36-1-28. In *Van Wyk's Trustee vs. Van Wyk* 13 S. C. 478, the will under consideration contained words very similar to the language of clause 21 with which we are now concerned. The testator directed that "in case one of the shareholders *should happen to die*, his *share* shall *devolve* upon his lawful heir". The Court decided that "the wording was more appropriate to a *predecease* of the testator, or at the least doubtful", and the presumption against *fidei commissary* substitution was accordingly applied. Similarly, it was decided in *ex parte Bosch* (1943) C. P. D. 369 that the presumption in favour of direct substitution can only be displaced by indications in the will "of so cogent a character as to leave no real doubt in the mind of the Court". In other words, there must be "a sufficiently clear balance of probability in favour of *fidei commissary* substitution". It seems to me that this is the proper

approach to a problem where the language of a will is found to be capable of either construction—*i.e.* of direct or *fidei commissary* substitution. I therefore take the view that clause 21 did not create a valid *fidei commissum*, and that the testator intended the appropraite shares in the Madampitiye property to vest absolutely, and without further restrictions, in each institute (or his substitute, as the case may be). Putting the matter at its very lowest, I am unable to say that there is no real doubt upon the point, and the presumption in favour of direct substitution must therefore prevail, *vide* also *Ex parte Kops and others* (1947) 1 S. A. L. R. 155.

I desire to state in conclusion that, even if it be legitimate to interpret the words under consideration as creating a *fidei commissum*, the will unequivocally provides for *only one grade of fidei commissaries*. There is certainly no justification for holding that clause 21 creates " a recurring or multiplex *fidei commissum*, circulating as it were throughout the family ". As *Voet* points out (36-1-28), " it must not be readily be assumed that the testator intended by means of several degrees of *fidei commissary* substitution to burden for all time those who were included in the family, and thus, contrary to the nature of ownership, to debar them of the right of making an unfettered disposition of the property they had acquired ". On this issue the case presents no difficulty to my mind, and there is really no need for resorting to the presumption against the creation of a multiplex *fidei commissum*. The will of Saviel Dias contains no words which are capable of the construction relied on by the plaintiff.

It was suggested by Mr. Perera in the course of the argument that some of the members of Saviel Dias' family had in the course of their dealings with each other acted upon the footing that clause 21 created a multiplex *fidei commissum* I do not see how this circumstance can alter the true legal position. For the defendant and his predecessors have continuously enjoyed the property on the basis of full ownership unfettered by any restrictions.

For the reasons which I have set out, I would allow the defendant's appeal and order that a decree be entered dismissing the plaintiff's action with costs both here and the Court below. In the view which I have taken, the plaintiff's cross-appeal necessarily fails, and must be dismissed.

IN THE COURT OF CRIMINAL APPEAL

Present : GRATIAEN, J. (President), GUNASEKARA, J. & DE SILVA, J.

REX vs. (1) J. M. KIRIWANTHIE, (2) K. MALHAMY

Appeal No. 44 *of* 1951 *with Applications Nos.* 59-60 *of* 1951

S. C. No. 3—*M. C. Nuwara Eliya, No.* 4874

Argued on : 9th & 10th July, 1951
Reasons decided on : 13th July, 1951

Court of Criminal Appeal—Defence counsel's undue attack on credibility of prosecution witness—Comment by trial Judge on counsel's conduct in his summing-up—Does it cause prejudice.

Where in a trial for murder the trial Judge expressed the view in his summing up to the jury, that the defence Counsel, in attacking the credibility of the main witness for the prosecution, had exceeded the bounds of decent advocacy and it was urged in appeal that the jury might have been unduly influenced by the strong views of the Judge on the improper conduct of the counsel.

Held : That in the circumstances of this case, the Judge was merely giving strong expression to his own opinion of the witness' credibility and of the criticisms of the defence Counsel, and had made it clear to the jury that they were not bound by his opinion.

Per GRATIAEN, J.—If, in this connection, the lawyer for the defence is so unwise, in the course of his final speech to the jury, as to make statements of fact unfavourable to a witness which are not borne out by the evidence in the case, we do not doubt that it is the duty of the presiding Judge in his summing-up to remove the effect of such improper statements. This process might well involve some criticism of the conduct of the lawyer concerned.

M. M. Kumarakulasingham with *J. G. Jayatilleke* and *J. C. Thurairatnam*, for the accused-appellants.

R. A. Kannangara, C. C., for the Attorney-General.

GRATIAEN, J.

The appellants were jointly tried for the murder of J. A. Podisingho, which offence was alleged to have been committed on 5th November, 1949. Podisingho had been employed since October, 1948, as a lorry driver on an estate in which the witness D. Manikkam was acting as superintendent during the relevant period. The Crown alleges that on 5th November, 1949, Podisingho left the estate in order to visit his wife, and that in the course of that journey he was waylaid and murdered by the appellants.

The case against the appellants was based almost entirely on circumstantial evidence. The evidence that Podisingho, who had admittedly been away from the estate on leave at the end of October, had returned to the estate on November 2nd and worked there until November 5th on which date he once again left the estate with Manikkam's permission, formed a vital link in the case for the prosecution. These facts were deposed to by the witness Manikkam. The learned presiding Judge made it very clear to the jury that the credibility of Manikkam was therefore a question of fundamental importance for their consideration. Indeed, he specifically directed them that if they entertained reasonable doubts as to the truth of his evidence, the case against the appellants necessarily broke down, as the rest of the evidence was insufficient to establish their guilt.

It is not surprising that in these circumstances the credit of Manikkam was vigorously attacked by the defence in the course of the trial, and the learned Judge charged the jury at some length and in considerable detail with regard to the various points on which Manikkam's evidence was challenged. It so happened that in this connection the learned Judge appears to have taken the view that the lawyer who appeared for one of the appellants had in some respects exceeded the bounds of decent advocacy in the manner in which he attacked Manikkam's integrity and reliability as a witness of truth. This opinion was communicated to the jury in the course of the summing-up, and at one stage the learned Judge indicated to them that it might be his duty, whatever the result of the case, to consider whether disciplinary action should be taken against the lawyer in question. That, of course, was a matter with which the jury were not concerned.

Learned Counsel for the appellants does not suggest that the conviction was bad for misdirection as to the law or as to the evidence. He complains however that the trial was unsatisfactory because, in considering for the purpose of their verdict the fundamental question as to the credibility of the witness Manikkam, the jury might well have been unduly influenced by the very strong views expressed by the learned Judge on an allegedly extraneous matter, namely, the impropriety imputed to the lawyer who had attacked this witness. We are unable to accept this submission. It is quite impossible, and we do not presume, to lay down any hard and fast rule as to how a Judge should control the proceedings in a criminal trial over which he presides. When the credit of a prosecution witness has been attacked, or when specific allegations have been made against him by way of defence, it may well be proper in some circumstances and indeed necessary to point out to the jury that certain of these criticisms or allegations have not been substantiated by evidence. If, in this connection, the lawyer for the defence is so unwise, in the course of his final speech to the jury, as to make statements of fact unfavourable to a witness which are not borne out by the evidence in the case, we do not doubt that it is the duty of the presiding Judge in his summing-up to remove the effect of such improper statements. This process might well involve some criticism of the conduct of the lawyer concerned.

In the context in which the lawyer's conduct was criticised in the present case, we have come to the conclusion that the learned Judge was merely giving strong expression to his own opinion as to Manikkam's credibility and as to the weight which he personally attached to the criticisms offered and the allegations made against the witness. At the same time, the learned Judge had made it very clear to the jury that they were the sole judges on all questions of fact, and that they were in no way bound by his opinions on such questions. For these reasons the Court was of the opinion that the grounds of appeal relied on by the appellants must fail and that the convictions must be affirmed. We accordingly made order dismissing the appeals. My judgment records the reasons for our decision.

Appeals dismissed.

Present : GRATIAEN, J. & GUNASEKARA, J.

A. R. WEERASURIYA vs. A. M. M. FUARD

S. C. No. 387/M—D. C. Colombo No. 18596/M

Argued on : 14th May, 1952
Decided on : 27th May, 1952

Proctor and client—Appellant induced to lend money on inadequate security—Material circumstances relating to inducement not fully disclosed by respondent, appellant's proctor—Action by appellant against respondent for loss on the ground of breach of duty—Duty of proctor to client—Nature of—Principles governing fiduciary relationship.

The appellant sought to invest a sum of money on a mortgage through the respondent, his proctor, who had negotiated such investments previously for him. He was induced to loan the money to one Samaratunga on a primary mortgage of his " Panwila " property and a secondary mortgage of his " Fincham's Land ", on statements made by the respondent's brother Samsudeen, an " unlicensed broker " as to the nature of the security and the integrity of the borrower, which were false, but which Samsudeen represented to the appellant as having been endorsed by the respondent.

At the time of the loan there was a hypothecary decree for Rs. 4,900 in respect of the Panwila property in favour of the respondent's cousin Naina Marikar and Fincham's Land was subject to a primary bond in favour of Moolchand for nearly Rs. 44,500 and to a secondary bond for Rs. 6,000 in favour of respondent's brother Samsudeen and respondent's wife. Out of the sum of Rs. 15,000 lent by appellant to Samaratunga Rs. 4,500 was paid to respondent's cousin Naina Marikar and Rs. 6,000 to respondent's brother and wife. In an action to recover the loan, the appellant ultimately was able to realize only a sum of Rs. 2,250 from Samaratunga.

The appellant alleged in his plaint that the respondent, acting as his legal adviser, had recommended an unprofitable investment introduced by Samsudeen and that his conduct constituted a breach of his professional duty arising under the contract of employment ; in particular that the respondent had acted fraudulently and with dishonest intention of furthering the interests of his own relatives—information regarding which interest he had improperly withheld from the appellant at the time of the transaction.

The respondent denied the allegation and pleaded that he had at all times expressly told the appellant that he should satisfy himself about the value and adequacy of the security and with which the appellant in fact was satisfied.

The learned District Judge dismissed the appellant's action on the ground that the respondent had not fraudulently concealed material facts within his knowledge with a view to inducing the appellant to make the investment, and that the respondent had sufficiently complied with his duty by informing the appellant of the existence only of the subsisting mortgages on Fincham's Land and the Panwila property respectively (without disclosing the identity of the mortgagees), and that it made no difference to the appellant whether the secondary mortgage was in favour of Samsudeen and the respondent's wife or in favour of some other parties.

The evidence in the case established that the respondent did not disclose to the appellant the extent to which his relatives stood to gain if the transaction went through ; that he did not sufficiently advise the appellant as to the safe margin which should be insisted on if the main security for the loan was to be a secondary mortgage of Fincham's Land, having regard to the proved unreliability and financial weakness of the borrower and to appellant's known inability to purchase the property himself at a forced sale ; that he did not sufficiently refute the recommendation of the borrower with which Samsudeen had deliberately associated him.

Held : (1) That the respondent's conduct in the transaction fell far short of the duty imposed on him by contract and also of " the duty of particular obligation imposed on him " by his special fiduciary relationship because he refrained from communicating to his client many circumstances within his knowledge which were material to his client's decision and consequently the appellant must succeed in his claim.

(2) That in a transaction arising from a fiduciary relationship of a special nature, such as where a proctor is invited to act professionally for a client which would benefit materially either the proctor or his close relatives, it is not necessary for the plaintiff to establish that the alleged breach of duty was due to intentional and deliberate fraud. It is sufficient for him to prove such facts that would show that there has been a dereliction of duty, however innocently, arising from his position of fiduciary relationship.

Per GRATIAEN, J.—When a proctor is engaged to advise a client in regard to a proposed investment, " his contract of employment imposes on him a duty to act skilfully and carefully.....and, superimposed on this contractual duty, is the duty imposed by his fiduciary position to make a full and not a misleading disclosure of facts known to him when advising his client ".

Cases referred to : *Powell vs. Powell* (1900) 1 Ch. 243 at p. 246.
Jayewickreme vs. Amarasuriya (1918) 20 N. L. R. 289 at p. 297.
Archbold vs. Commissioners of Charitable Payments for Ireland (1849) 2 H. L. C. 440.
Nocton vs. Lord Ashburton (1914) A. C. 932.
Abdul Cader vs. Sittinisa (1951) 52 N. L. R. 536.

N. E. Weerasooria, Q.C., D. S. Jayawickrema and *G. T. V. Samarawickreme*, for the plaintiff-appellant.

J. R. V. Ferdinands and *Azeez*, for the defendant-respondent.

GRATIAEN, J.

This appeal relates to a claim against a Proctor of this Court consequential on an alleged breach of professional duty to his client.

The appellant, on his retirement from Government service in 1941, had drawn a commuted pension which, together with a sum lying to his credit with his Benevolent Association, amounted to Rs 9,158. He had in addition accumulated some modest savings which brought up the total of his capital to Rs. 13,000. He desired to invest this sum in order to supplement his income which was now represented by a monthly Government pension of Rs. 149, and with this object in view, he obtained an introduction to the respondent who was a Proctor and Notary Public with a good reputation practising his profession in Colombo for over 25 years

The appellant first invested a part of his capital through the respondent in a mortgage executed in his favour by a borrower named Visvanam. This loan was duly repaid in 1942, and the appellant was once again on the look out for a suitable investment. Apparently, he had at one stage conceived the idea of purchasing a small residential bungalow for himself and his family, but he had not succeeded in finding a property which he could afford to buy In the result, his capital lay idle for some months, and he was, to the respondent's knowledge, anxious to re-invest his money. " He used to come practically daily," the respondent said, " and talk to the brokers who come to my office to invest his money ".

It is convenient at this stage to refer to two other persons who played a prominent part in the subsequent transaction which forms the subject-matter of this litigation. They are the respondent's brother Samsudeen (*alias* " Shams ") and a man named Samaratunge who had on many previous occasions borrowed money invested by clients of the respondent.

Samsudeen has been described as an " unlicensed broker ". He shared the respondent's office for the purposes of his business, and was also given access to the respondent's office stationery. Samsudeen made full use of these facilities (whether with or without the respondent's express authority) so as to induce prospective customers to believe that business recommended by him was also recommended by the respondent. By these means, his activities enjoyed the cachet of his brother's professional reputation. The letters marked P48, P49 and P50, with Samsudeen's name significantly typed above the printed name of the respondent on the respondent's note paper, furnish sinister evidence of Samsudeen's technique in attracting business. " He was trying to bait a fish ", said the respondent, " by using my name ". I shall have occasion to examine these letters more particularly at a later stage of my judgment, but in the present context it is sufficient to state that they contain many gross misrepresentations of fact which were designed to tempt the appellant into making an imprudent investment " These are things ", said the respondent, " which brokers generally write to their clients " Even if this sweeping exaggeration be construed as giving expression only to his estimate of the business methods of his own brother, it is quite deplorable that, in any view of the matter, the respondent should have acquiesced in a procedure which facilitated such improprieties in regard to business which was ultimately transacted professionally by himself.

Samsudeen was called as a witness by the appellant in order to establish the fact that P48, P49 and P50 were written by him from the respondent's office and with at least his apparent authority. But I cannot accept the artificial proposition that, merely because Samsudeen was in a sense the appellant's witness, the appellant is necessarily bound by every false statement which Samsudeen took the opportunity of making in the witness box. In the first place, Samsudeen is, on his brother's own assessment, a person whose word should not be accepted by a Court of Law without most careful scrutiny. Moreover, his evidence betrays a desire to assist his brother's defence whenever possible—indeed, in some instances to the point of demonstrable absurdity. I mention by way of illustration his suggestion that the description in P48 of the proposed borrower as " a long standing client of *ours* during the last 10 years " was intended to convey that Samaratunge had during that period been a "client" *of the appellant* and not of the respondent.

I now pass on to the person Samaratunge who had in truth been a long standing client of the respondent and Samsudeen in the sense that he had on many previous occasions borrowed money from persons introduced by them.

At the time when the appellant was looking for a suitable re-investment of his modest capital, *i.e.*, towards the latter part of 1942—Samaratunge was, or claimed to be, the owner of two properties (or, to be more accurate, various allotments of land comprising two properties) to which I shall for convenience refer as " the Panwila Property " and " Fincham's Land " respectively. It is necessary to examine in respect of each property Samaratunge's more recent transactions during the relevant period— all of which transactions the respondent had been instrumental in negotiating in his professional capacity.

The Panwila property consisted of six separate lands, some of which are described as "undivided" allotments of larger lands. Samaratunge claimed to have inherited his property from his father Bilinda, but he apparently had no " paper title " to support this claim. On 20th December, 1940, he executed in his own favour a somewhat unusual document D3, attested by the respondent as notary and Samsudeen as witness, declaring himself to be its lawful owner " for the better manifestation of his title thereto ". The value of the entire property was stated in the deed to be Rs. 2,000. The respondent admits, both in his evidence and in certain letters written by him before the action commenced, that this property was not such as he would recommend as attractive security to a prudent investor.

On 20th August, 1941, Samaratunge borrowed Rs. 3,750 from Naina Marikar on a primary mortgage of the Panwila property (P41). Naina Marikar was the first cousin of the respondent and Samsudeen, and they were on this occasion as well the attesting notary and witness respectively. The chief security for the loan, however, was contained in a contemporaneous " indenture of lease ", so called, which was primarily intended to enable the lender to liquidate the debt by securing for himself the tea coupons issued in respect of the land—a device which, as is well known, was frequently resorted to during the period when " coupons " were negotiable and marketable documents issued in respect of properties registered under the scheme whereby the export of tea from Ceylon was controlled by Government machinery. " Upon that promise ", says the respondent, " the money was lent ". Samaratunge did not, however, honour the arrangement by which his debt was to be liquidated. " One day ", continues the respondent, " he came to my office with about 6,000 to 7,000 pounds of tea coupons and told me that he was going to deliver those coupons to Naina Marikar ". This was a false promise. The coupons were not delivered, and accordingly on 20th February, 1942, the respondent, acting on behalf of his cousin Naina Marikar, instituted action No. 532 M. B. in the District Court of Colombo against Samaratunge for the recovery of the debt. " I sued him ", says the respondent, " because he tricked me. He was not keeping to his promises".

As one would expect, Samaratunge proved to be an elusive defendant in the mortgage action. Process was issued and re-issued against him from time to time without success. Eventually, on 17th August, 1942, he appeared in Court and consented to judgment. He was granted 6 months time within which to pay the judgment debt. A formal hypothecary decree for Rs. 3,750, interest and costs was entered of record on this basis on 12th September, 1942, and in the result the Panwila property, in whose realisable value the respondent admittedly reposed little confidence, became liable, in default of payment before 12th March, 1943, to be sold up for the recovery of the judgment debt. No doubt Naina Marikar and others interested in his welfare were in a state of some despondency as to his prospects of recovering the money which he had lent on unreliable security to a debtor introduced to him by his two cousins. It would certainly have been to his advantage if he could be rescued from his predicament without the need for selling up the Panwila property.

I now refer to the other poperty known as " Fincham's Land ". After certain preliminary negotiations had taken place, Samaratunge borrowed a sum of Rs. 35,000 from a man named Moolchand on a primary mortgage of this property under the Bond P36 dated 2nd June, 1941, also attested by the respondent. The truth is that at the time of the earlier negotiations Samaratunge had not yet become the owner of the property, and that the entire sum borrowed from Moolchand was utilised by Samaratunge for the purpose of acquiring title to the property, contemporaneously with the execution of P36, under a conveyance also notarially attested by the respondent, from the previous owner.

Fincham's Land is stated to be 146 acres in extent, of which 85 acres were planted in tea and 30 acres in cardamon, the rest of the property being jungle land. In 1941 its chief source of revenue seems to have been the market value of its tea coupons periodically issued under the tea restriction scheme, and for this reason, when P36 was executed, a so-called " indenture of lease ", similar to that created in the Panwila transaction, was executed in favour of Moolchand.

Moolchand gave evidence at the trial, and he stated in evidence that the " tea coupon scheme " terminated in May, 1942. This circumstance possibly explains why the extent of Samaratunge's liability under P36 had increased by 15th January 1943, (according to an account stated (P37) between both parties), to Rs. 44,500.

Contemporaneously with the execution of P36, Samaratunge granted a secondary mortgage D2 also attested by the respondent, in favour of Samsudeen and the respondent's wife jointly. The Bond states that the sum due to Samsudeen was Rs. 2,500 and to the respondent's wife was Rs. 3,500. The respondent states that the consideration for these two " loans " was paid in his presence in cash on the date of the bond. The Bond D2 was expressed, however, to carry no interest on either " loan ". The reason for this

liberality on the part of the creditors concerned was not explained at the trial. At any rate, I am not disposed to probe the interesting theory that the sum covered by the bond represented in truth commission for services rendered by Samsudeen and the respondent in negotiating P36.

It is not suggested that Samaratunge owned any property besides the Panwila property and Fincham's Land at any time during the relevant period.

Samaratunge was called as a witness at the trial by the appellant's counsel for reasons which are certainly obscure. He too, like Samsudeen, took the opportunity of making many statements, some of them patently false, unfavourable to the appellant's case. Here again, I reject as artificial the argument that the appellant must necessarily be regarded as bound by the falsehoods to which Samaratunge gave utterance while he was in the witness box.

The scene now shifts to the latter part of November, 1942. The relative financial positions of Samaratunge and the appellant at the point of time may be summarised as follows :—

A. As far as Samaratunge was concerned, his position had, to say the least, become too precarious to justify any hope which he may have entertained of obtaining further loans from any prudent investors :—

(1) A hypothecary decree for Rs. 4,990 interest and costs in respect of the Panwila property had already been entered against him *in favour of the respondent's first cousin Naina Marikar*, and this property was liable to be sold in execution within a few months. No payment had been made in reduction of the judgment debt up to the end of November 1942, and the prospect of making any future payment by honourable means must have been very remote ;

(2) Fincham's Land was subject to a primary bond in favour of Moolchand to secure the payment of a debt which by this time had increased to very nearly Rs. 44,500. It was also still subject to a *secondary mortgage bond for Rs. 6,000 in favour of the respondent's brother and the respondent's wife.* The loans secured by this latter bond had been outstanding for approximately 18 months without any right in the joint-creditors to receive interest. There was no valid reason why Samsudeen or Mrs. Fuard or anyone protecting their interests should regard the security as satisfactory ;

(3) An important source of income from both properties had, if Moolchand's uncontradicted evidence on the point be true, dried up ; when the tea coupons were available, Samaratunge had improperly contrived to divert them from his creditors, and he apparently now lacked the means (even if he had the inclination) to meet his financial engagements at the due dates in any other way. Shortly stated, he was a most unsatisfactory debtor from every point of view.

B. Turning now to the appellant's financial position, he still had capital in his hands to the extent of Rs. 13,000 which he was anxious to invest in order to supplement his only other source of income, namely, a monthly pension of Rs. 149 and a modest cost-of-living allowance for the maintenance of himself and his family.

These facts which I have set out had substantially come to the knowledge of the respondent in the course of his professional employment by the clients concerned.

On 17th November, 1942, Samsudeen wrote the letter P48 to the appellant from the respondent's office in the following terms :—

" A. M. Shams,
C/o A. M. Fuard,
Proctor & Notary.
130, Hultsdorf Street,
Colombo, 17th November, 1942
Telephone No. 5446.

" Dear Mr. A. R. Weerasuriya,

After I met you at Main Street in Colombo, when I went to office in the noon I was surprised to find the client of ours whose business I casually suggested you. *This client is one Mr. K. R. Samaratunge a long standing client of ours for the last nearly ten years or so. And he will pay interest very regularly and do good business.* Now he want Rs. 15,000 on a primary mortgage of his house property with 3 acres of land and 15 acres fully planted tea near his home. This bungalow where he is residing now, it is a good one with water services, etc. These two properties were situated at Medakotuwa, Panwila is only 13 miles from Kandy. *Title is Crown.* Further Mr. Fuard had suggested me to get another large estate of 146 acres tea belonging to him, near about Kandy as secondary mortgage as an additional security, *this estate is worth over Rs. 80,000 it has a primary mortgage of Rs. 40,000 and interest have been paid up to date. Out of this Rs. 15,000 a sum of Rs. 5,000 will be repaid to you in six months' time and the balance money will be paid back after an year. As he returning the money early in instalment, he had agreed to pay you an interest of 9 (nine) per cent. This is a good business, he will be very regular in paying you the interest should you accept this.* If so please let me know when you can conveniently inspect the land, I shall make all arrangement. This security does not

appear as it sufficient enough, but if you will go to see you will realise. In the other hand *the borrower is absolutely good and you will be more than satisfied* ".

(I have taken the liberty of underlining the statements which were specially calculated to interest the appellant in the investment proposed to him.

Five days later Samsudeen wrote another letter P49, to the appellant as follows :—

" A. M. Shams.,
C/o A. M. Fuard,
Proctor & Notary.
130, Hultsdorf Street,
Colombo, 23rd November, 1942.
Telephone No. 5446.

" A. R. Weerasuriya, Esq.,
Sirisevena,
Ambalangoda.

Dear Mr. Weerasuriya,

I am in receipt of your letter dated the 18th instant and I immediately communicated with my client *having consulted Mr. Fuard.* I have fixed up to inspect these properties of Mr. Samaratunge at Kandy on this Sunday, the 29th inst. Please be in Colombo at the Kandy bus stand at 5th Cross Street near the Municipal latrine between 7 and 8 in the morning. We got to inspect this property definitely on this Sunday. From Colombo we have to go by bus to Kandy and Mr. Samaratunge will be meeting us at the bus stand positively at Kandy and we will have to take breakfast at Kandy and then proceed to the estate by car.

Mr. Fuard highly recommends this loan."

On 26th November, 1942, Samsudeen wrote P50 :—

" A. M. Shams.,
C/o A. M. Fuard,
Proctor & Notary.
130, Hultsdorf Street,
Colombo, 16th November, 1942.
Telephone No. 5446.

" Dear Mr. Weerasuriya,

I received your letter dated the 24th inst., for which I thank you.

Re Interest.—I have managed to fix up the rate of interest at 10% through Mr. Fuard. Now it is O. K.

Hope to meet you on the 29th morning at the bus stand between 7 and 8."

[The special recommendations contained in P49 and P50 have also been underlined by me.]

On 3rd December, 1942, the plaintiff lent to Samaratunge a sum of Rs. 15,000 (representing his entire capital augmented by a sum of Rs. 2,000 made available to him by a relative) on the mortgage bond P1 carrying interest at 10 per centum per annum. The bond was attested by the respondent as notary and by the respondent's brother Samsudeen as witness. The security covered by the bond was (*a*) a primary mortgage of the Panwila property, (*b*) a secondary mortgage of Fincham's Land.

At the time of the execution of P1 the appellant handed to the respondent, as attesting notary, two cheques for Rs. 375 and Rs. 14,625 respectively. The cheque for Rs. 375 was endorsed and returned to the appellant to cover 3 months' interest in advance. The balance sum of Rs. 14,625 was distributed by the respondent as follows :—

(*a*) Rs. 375 was retained by the respondent on account of stamps, fees, etc.

(*b*) Rs. 4,500 was paid to *the respondent's first cousin Naina Marikar*, the judgment-creditor in the pending mortgage action, in consideration of which payment (and of a fresh mortgage for Rs. 1,000 postponed to P1) satisfaction of the decree was duly entered of record. In the result, Naina Marikar had the good fortune to receive back in cash his capital investment, together with a sum of Rs. 750 in substantial reduction of his claim, interest and costs.

(*c*) Rs. 2,500 was paid to *the respondent's brother Samsudeen* in full settlement of his claim on the Bond D2.

(*d*) Rs. 3,500 was paid to *the respondent's wife* in full settlement of her claim on the Bond D2.

(*e*) Rs. 3,750 was paid to Samaratunge personally. (There is no evidence as to whether any part of this sum was later paid by him to the respondent's brother Samsudeen as remuneration for negotiating this most opportune loan. On the other hand, there is no evidence which would justify the assumption that the services rendered by Samsudeen in the transaction had been actuated solely by motives of liberality).

In the result, at least Rs. 10,500 out of the capital invested by the appellant was directly utilised to the financial benefit of three close relatives of the attesting notary. And in each case the relative so benefitted had been rescued from the situation of being the creditor of a person who could have had no reasonable prospect of raising further money from prudent investors and whom the notary concerned admittedly regarded at the time as " a difficult customer who would never keep to his word ". From the point of view of these persons, the completion of the transaction can certainly be regarded as entirely satisfactory.

The investment, as any reasonable person should have foreseen, proved disastrous. No change occurred in either Samaratunge's financial position or in his respect for the sanctity of his contractual obligations. He defaulted in the payment of interest from the very start, and the only sum which the appellant received on this account was the single payment of Rs. 375 which had been retained to cover 3 months' interest in advance. The position further deteriorated in September, 1943, when Moolchand sued Samaratunge to enforce his primary bond in respect of Fincham's Land, the appellant being joined in the action as secondary mortgagee. Decree in Moolchand's favour was entered for Rs. 51,620 together with further interest and costs. On 19th April, 1944, the mortgaged property was sold in execution of the decree and was bought by Moolchand for only Rs. 16,000. Moolchand states that he succeeded shortly afterwards in reducing his own loss to some extent by selling Fincham's Land to an outsider for Rs. 30,000. Whether the value of the property has more recently been enhanced by reason of the boom conditions of the post-war period is quite beside the point.

The result of the sale of Fincham's Land in execution of Moolchand's decree was that the appellant's interests as secondary mortgagee were wiped out. There remained only his security on the primary mortgage of the Panwila property. In June, 1944, the appellant sued Samaratunge on the bond and obtained a decree for Rs. 17,765·62 At a judicial sale conducted on the land in the presence of 20 or 30 people on 9th March, 1946, it was purchased by an outsider for only Rs. 2,250. This sum, together with the sum of Rs. 375 originally retained as interest in advance, represents all that the appellant was able to recover out of the capital investment of Rs. 15,000, to say nothing of the expenses incurred in the mortgage action. In the result, the appellant has been almost completely impoverished, and he has since been reduced to the necessity of supplementing his income as a pensioner by obtaining temporary employment on a small monthly salary.

Up to this point in the narrative, the facts as I have substantially set them out are not in dispute, but there is much divergence between the versions of the appellant and the respondent respectively as to the part which the latter played in putting through this most disastrous investment.

The gist of the appellant's complaint is that the respondent, acting as his legal adviser, had recommended the unprofitable investment introduced by Samsudeen, and that his conduct constituted a breach of his professional duty arising under the contract of employment ; in particular, that the respondent had acted fraudulently and with the dishonest intention of furthering the interests of his own relatives—information regarding which interests he had improperly withheld from the appellant at the time when the transaction took place. In these circumstances he claimed that the respondent should indemnify him for the loss sustained by him which he assessed, at the time when the action commenced, at Rs. 20,000.

The respondent denied the allegations made against him. He admitted in his pleadings that the appellant had " consulted him professionally from time to time regarding his investments ", and that he had " rendered the (appellant) professional services from time to time ". With regard to the particular investment of 3rd December, 1942, however, he pleaded that he " had at all times expressly told the (appellant) that he must satisfy himself about the value and adequacy of the security " and that " the (appellant) satisfied himself accordingly ". Finally, he pleaded that " the security was adequate in fact, though the (respondent) did not recommend either the security or the borrower ". The answer does not explicitly refer to the complaint that the adverse interests of " others ", *i.e.* of the respondent's relatives to whom I have referred, were not previously known to the appellant or communicated to him at the relevant time.

The case went to trial on as many as 12 issues. The learned District Judge has answered in the affirmative the following issues :—

" 1. Did the plaintiff employ the defendant *as his legal adviser* and to act for and on his behalf in connection with the investment of Rs. 15,000 in or about November, 1942 ? "

" 2. *In pursuance of such employment* did the defendant invest the said sum of Rs. 15,000 with K. R. Samaratunge on Bond No. 2308 of 3-12-42 ? "

On the other hand, the learned Judge has expressly held that the respondent had not " fraudulently concealed material facts within his knowledge with a view to inducing the (appellant) to make the investment ". In this view of the matter, he decided that the further issue whether the respondent had " committed a breach of his contract of employment with the (appellant) and/or an intentional dereliction of professional duty relative to the investment " did not arise for consideration.

For the reasons which I shall later indicate, it seem to me that the learned District Judge has not paid sufficient regard to the very high standard of conscientiousness which a Court of Law, " exercising jurisdiction as a Court of conscience " must always demand from legal advisers to whose contractual obligations there are superadded cer-

tain " duties of particular obligation " arising from a fiduciary relationship of a special nature—such as, for instance, where a proctor is invited to act professionally for a client in a transaction from which either the proctor or his close relatives stand to benefit materially. As I read the judgment under appeal, the learned District Judge, in disposing of issue 5, seems to take the view in this particular case that the respondent had sufficiently complied with his duty by informing the appellant of the existence only of the subsisting mortgages on Fincham's Land and the Panwila property respectively (without disclosing the identity of the mortgagees). Accordingly, he holds, " it made no difference to the (appellant) whether the secondary mortgage was in favour of Samsudeen and the respondent's) wife or in favour of some other parties ". With great respect, I cannot subscribe to this view. " A solicitor who accepts such a post puts himself in a false position ; if he acts for both (parties), he owes a duty to both, to do the best that he can for both ". Per Farwell, J. in *Powell vs. Powell* (1900) 1 Ch. 243 at p. 246. It was the plain duty of the respondent to have made it very clear to the appellant that his wife, his brother and another close relative, for all of whom he was also acting and in whose financial advantage he had a special concern, were particularly interested in the proposed loan to Samaratunge going through. He should unambiguously have warned the appellant of the extent to which the situation created a conflict between his interest and his duty in order that, being thus forewarned, the appellant might have the opportunity of preferring to consult an independent and disinterested lawyer before making a final decision in the matter. Indeed, I take the view that he should have insisted that the appellant should obtain his legal advice from someone else.

Notwithstanding this infirmity in the learned Judge's method of approach to the matter arising for his decision, I cannot lose sight of the circumstance that there is a very strong finding of fact in favour of the appellant on the issue of deliberate fraud in the sense in which that term implies a dishonest intention, by means of false misrepresentations, to secure a benefit for his own relatives at the appellant's expense. As a Judge of appeal, lacking the advantage of having seen and heard the witnesses, I cannot presume to substitute my own opinion on this grave issue for that of the learned Judge. On the other hand, the trial Judge's answer to issue 5, though it quite explicitly disposes of the allegation of fraud, was clearly not intended to express the view that the respondent had in fact disclosed every fact known to him which was relevant to the appellant's decision whether or not to grant the proposed loan to Samaratunge.

Does the acquittal of the respondent on the issue of *actual* (as opposed to *constructive*) fraud conclude the case against the appellant ? This cannot be so. In the present case, each party had placed his version of the transaction very fully before the Court. The appellant's cause of action, shortly stated, is that the respondent is liable to indemnify him for his loss because the respondent had failed to perform his professional duty in regard to the transaction. No doubt the appellant has failed to satisfy the trial Judge that this alleged breach of duty can be equated to the commission of an intentional and deliberate fraud. But it does not necessarily follow, however, that, *if sufficient facts have been proved entitling the appellant to succeed in his claim to be indemnified*, he must be denied justice merely because " his pleader has chosen to over-state his client's case and the Judge to frame an issue embodying that over-statement ". Per Lord Atkinson in *Jayewickreme vs. Amarasuriya* (1918) 20 N. L. R. 289 at p. 297.

If fraud be imputed unsuccessfully but unnecessarily as forming one of the ingredients of a cause of action, justice requires that the Court should nevertheless grant relief to the injured party provided that other matters were alleged and proved which would give the Court jurisdiction as the foundation of a decree. *Archbold vs. Commissioners of Charitable Payments for Ireland* (1849) 2 H. L. C. 440. It was by the application of this principle that, in a case which is in many respects similar to the present litigation, the House of Lords granted an indemnity to a client against his solicitor against whom an allegation of fraud had failed but against whom dereliction of duty arising from his position of fiduciary relationship was nevertheless established. *Nocton vs. Lord Ashburton* (1914) A. C. 932. When the real character of the litigation has been made plain, said Lord Haldane, one should not permit the issue between the parties to be clouded by " difficulties which are concerned with *form* and not with *substance* ". In my opinion the averments in the plaint justify the examination of the plaintiff's claim on the basis of a cause of action founded in *tort* or in *contract* or in *breach of duty* or even in a combination of all these elements.

It is indeed unfortunate that, having satisfied himself that the respondent had not intentionally defrauded the appellant, the learned Judge did not direct his mind to the further question whether upon the facts the respondent had nevertheless " violated, however innocently (because he had misconceived the extent of the obligation which a Court of Equity imposes on him), an

obligation which he must be taken by the Court to have known ". *Nocton's case* (supra) at p. 954. This Court therefore deprived of the advantage of having before it any clear adjudication upon many material issues which are controversial. Normally, the situation would have called for a re-trial, but in the present case I am satisfied that justice can be done without exposing the parties to the inconvenience and expense of a trial *de novo* regarding the circumstances of a transaction which had taken place nearly 10 years ago.

I shall now enumerate the points which have particularly weighed with me in reaching the conclusion that there is sufficient material upon which the liability of the respondent has been established even if one were to take a view that is least unfavourable to his professional honour :

1. The learned Judge has expressly held that the respondent acted as the appellant's legal adviser in the transaction, and the respondent admits that he did in fact tender certain professional advice to the appellant in that connection : in determining the sufficiency of this advice, it is not improper, I think, to pay special regard to the version contained in his letters P61 of 14th November, 1945, (in reply to P60), P63 of 30th November, 1945, (in reply to P62) and P67 of 17th October, 1945, (in reply to P66). Certain statements made by him for the first time in the course of cross-examination, and which the appellant had not been given the opportunity of denying when he was in the witness box, are to my mind far less reliable ;

2. Notwithstanding the protestations of Samsudeen and Samaratunge it is very clear from the documents P48, P49 and P50 that the loan and the proposed borrower Samaratunge were in the first instance recommended to the appellant by Samsudeen. These letters not only contain many false statements as to the nature of the security and the integrity of the borrower, but they also expressly purport to associate the respondent with those statements. The appellant who was not cross-examined on this point, has stated that these letters were shown by him to the respondent, and this fact has been denied by the respondent. I regret that, in spite of my admitted disadvantages as an appellate Judge, I do not believe the respondent could have unambiguously removed the false impression which Samsudeen had given as to Samaratunge's personal unsuitability as a debtor. This point was not suggested to the appellant in cross-examination, nor did the respondent claim to have so acted in any of his earlier letters addressed to the appellant or the appellant's proctor. It is inherently improbable that the appellant would have proceeded with the business if he had been made to realise that Samsudeen's written encomiums of Samaratunge, purporting to have been endorsed by the respondent himself, were deliberately false ; in this respect also the respondent has failed in his professional duty ;

3. There is a finding in favour of the respondent, and the appellant admits, that the respondent had warned him that he must satisfy himself as to the value of Fincham's Land, and that it was safer to regard this property as the substantial security for the proposed loan. But in the present case I do not regard this advice as even nearly approximating to the kind of professional advice which the situation demanded. Before the action commenced, the respondent set out in writing the nature of the professional advice which he claims to have given. " I cautioned you ', he said in his letter P61, " that you should not lend unless you were satisfied that the big property (*i.e.* Fincham's Land) is worth over Rs. 50,000. In fact, I remember very well that I advised you not to place any value over his (Panwila property) because it consisted of several small lots. Further, I told you that you should lend Rs. 50,000 only if (Fincham's Land) is worth Rs. 50,000 ". This letter also confirms that the respondent had told the appellant that in his own opinion Fincham's Land was in fact worth " somewhere near Rs. 50,000 ". It seems to me that even on this hypothesis, the professional advice given by the respondent was in all the circumstances quite inadequate. It is not pretended that the appellant was warned that the sum outstanding on the primary bond in Moolchand's favour now exceeded, or (in the absence of precise information) must be assumed to have exceeded Rs. 40,000. The proper advice should have been that there was a real risk that the security of a secondary mortgage would, particularly in the event of a forced sale, prove to be virtually negligible unless its realisable value left over an ample margin to meet that contingency. A lay client, inexpert in valuation and known to possess little previous experience of investments, cannot reasonably be expected to advise himself as to the sufficiency of the security offered unless he is forewarned of the special risks to be avoided.

4. As I have previously said, the respondent should have disclosed the fact that his close relatives, for whom he was acting, were Samaratunge's creditors and stood to benefit if the transaction went through. The appellant con-

sistently maintained that he was unaware of this circumstance until long afterwards. In his letter P60 dated 12th March, 1945, (*i.e.* nearly 5 years later) he wrote to the respondent " I understood that the money lent by your relations, also I believe on your advice, has been paid by Mr. Samaratunge ". The reply to this categorical allegation was " In your letter you seem to imagine lots of things to blame me. Still Mr. Samaratunge owes money to my relatives ". This was certainly not a very frank statement in the circumstances of the case, and I am perfectly satisfied that the respondent had not at any relevant period of time disclosed to the appellant the nature or the extent of the interests of his relations in the transaction. Indeed, the respondent admits that he did not give this vital information, his excuse being that the appellant had told him " that he had heard that my wife had lent money and that my brother had lent money on that land. I did not therefore tell (the appellant) that my wife had a mortgage". Indeed, it is implicit in the findings of the trial Judge that this relevant information, *which the learned Judge erroneously regarded as immaterial*, had not in fact been disclosed to the appellant. I find myself unable to accept as valid or as truthful this excuse for non-disclosure which was not suggested to the appellant in cross-examination or given when the first opportunity arose to offer an explanation.

When a proctor is engaged to advise a client in regard to a proposed investment, " his contract of employment imposes on him a duty to act skilfully and carefully.....and, superimposed on this contractual duty, is the duty imposed by his fiduciary position to make a full and not a misleading disclosure of facts known to him when advising his client ". *Nocton's* case (supra). As Lord Haldane states, " when a solicitor has financial transactions with his client and has handled his money to the extent of using it to pay off a mortgage made to himself, the Court has jurisdiction to scrutinise the transaction ". No less vigilantly should his conduct be examined when the money is utilised to settle not his own personal claims but those of his relatives. See also *Abdul Cader vs Sittinisa* (1951) 52 N. L. R. 536, where the same principles were applied by this Court in setting aside a transaction put through by a proctor for his wife's benefit.

Examined in this way, the respondent's conduct in the transaction under consideration fell far short of the duty imposed on him by contract and also of " the duty of particular obligation " imposed on him by his special fiduciary relationship. Putting the case against him at the very lowest, he did not disclose to the appellant the extent to which his relatives stood to gain if the transaction went through ; he did not sufficiently advise the appellant as to the safe margin which should be insisted on if the main security for the loan was to be a secondary mortgage of Fincham's Land—having regard particularly to the appellant's known inability to purchase the property himself at a forced sale in order to protect himself ; Samaratunge was a debtor of proved unreliability whose financial position had by the beginning of December, 1942, become well-nigh desperate ; and the respondent did not sufficiently if at all, refute the recommendation of the borrower with which Samsudeen had deliberately associated him in the letters P48, P49 and P50. In other words, he refrained from communicating to his client many circumstances within his knowledge which were material to his client's decision. It was a breach of duty in the facts of the present case to withhold any information as to the special risks attending the proposed transaction.

In any view of the matter, the respondent's conduct has fallen short of the high standard of conscientious duty exacted by well defined principles of the Common Law. The appellant has lost his money in consequence and is in my opinion entitled to claim an indemnity for the loss which he has sustained.

It is not suggested that the sum of Rs. 20,000 claimed of this account is in any way excessive. The appellant could not by any means within his power or within the realm of practicability have minimised his loss. I mention this point because the learned Judge has stated, presumably by way of criticism, that the appellant " does not appear to have taken any steps to purchase (Fincham's Land) himself or pay off the money due to Moolshand. If he had paid the money due to Moolchand, then (the appellant's) bond would have been a primary bond ". I really do not understand how a Government pensioner who had already invested his entire capital (and indeed, some borrowed money as well) in granting the loan to Samaratunge could have been expected to raise sufficient funds to settle the very substantial judgment-debt in favour of Moolchand in order to protect his own hypothecary rights.

In my opinion, the judgment under appeal should be set aside and a decree entered in favour of the appellant against the respondent as prayed for with costs, both here and in the Court below.

GUNASEKARA, J.

I agree.

Appeal allowed.

Present : CHOKSY, A.J.

REX vs. KANAGARATNAM *et al.*

S. C. No. 32—M. C. Nuwara Eliya, No. 6298
1st Midland Circuit (Assize) holden at Kandy

Delivered on : 19th May, 1952.

Criminal law—Indictment—Offences of conspiracy and of abetment to commit criminal breach of trust—Joinder of charges—Multiplicity of—Prejudice—Sections 113*b*,391 *Penal Code—Sections* 168 (2), 180 (2) *Criminal Procedure Code.*

Four persons were indicted on several counts, the first count being that they agreed to commit or abet or agreed together with a common purpose for or in committing or abetting criminal breach of trust of money being the property of the National Bank of India, Ltd., Nuwara Eliya " and that they did thereby commit an offence punishable under section 391 read with section 113B of the Penal Code.

Counsel objected to the charge on the ground that the count put together four different conspiracies to commit criminal breach of trust of money, and in so far as it referred to abetment it was bad for vagueness and for want of particulars.

Counsel objected to joining in one and the same indictment counts 7 and 8 as these counts alleged commission of an offence separate and distinct from the conspiracy charged in count 1.

Counsel also objected to count 3 in that it sought to charge all the accused with having abetted the second accused in regard to criminal breach of trust of a gross sum between two terminal dates. Instead the prosecution should have selected any three items and charged the accused with having abetted the offence of criminal breach of trust in respect of those three specific items only and not more.

Held : (1) That the objection to count 1 must be over-ruled on the ground that the Crown alleged one single conspiracy between all the accused in which they put their heads together and agreed to act with one single common purpose of design, namely, to misappropriate the money of the Bank and that it was not possible antecedently to allocate to each separate accused a definite part to play.

(2) That the objection to counts 7 and 8 and 3 cannot be sustained as there was a single conspiracy in furtherance of which at different stages the first, third and fourth accused abetted the second accused in the misappropriation and that at other stages the first accused furthered the common objective of misappropriation by falsifying the documents.

(3) That it is permissable under the provisions of section 180 (2) of the Criminal Procedure Code to join charges in one and the same indictment where the same facts constitute the offences of conspiracy under section 113B and also of abetment under section 102 of the Penal Code.

(4) That count 3 adequately sets out the mode of abetment coupled with section 100 of the Penal Code.

Per CHOKSY, A.J.—The principle that seems to emerge from that case is that once there is a charge of conspiracy to commit a certain specified offence all the accused can be charged not only for that conspiracy but also for the various criminal offences committed by the different conspirators individually, or abetted by some of them and committed by others of them, even though all the conspirators may not have been aware of or being party to the various individual offences of their co-conspirators, so long as those offences were committed or abetted in pursuance of that same conspiracy.

Cases referred to : *King vs. M. E. A. Cooray* (1950/51) N. L. R. 433.
King vs. Andree, 42 N. L. R. 495.
King vs. Aspinall (1872) 2 Q. B. D. 48.
King vs. Ponnusamy Sivapathsunderam, 44 N. L. R. 13.

G. E. Chitty, with *A. I. Rajasingham*, for the 1st accused, *Mudanayake*, for the 2nd accused, *Issadeen Mohamed*, for the 3rd accused, *A. I. Rajasingham*, for the 4th accused.

R. A. Kannangara, Crown Counsel, with *L. B. T. Premaratne, Crown Counsel* and *S. S. Wijesinghe, Crown Counsel*, for the Crown.

CHOKSY, A.J.

The four accused in this case have been indicted on several charges all of which revolve round the commission of the offence of criminal breach of trust of a sum of Rs. 103,445·28 being the property of the National Bank of India, Nuwara Eliya Branch. Of the several counts in the indictment the first charges all the four accused with agreeing " to commit or abet and to act together with a common purpose for or in committing or abetting criminal breach of trust of money being the property of the National Bank of India, Ltd., Nuwara Eliya " and that

they did thereby commit an offence punishable under section 391 read with section 113B of the Penal Code.

Objection was taken by Mr. Chitty who appeared for the 1st accused and also by Counsel for all the accused, that this count as framed was objectionable in that it joined together in one count a number of charges which were logically inconsistent with each other. Alternatively he took the objection that even if they were logically consistent with one another yet they could not all be joined together in one count. Put briefly his objection was that the count as appearing in the indictment really put together four different conspiracies to commit criminal breach of trust of money belonging to the bank. He analysed the count as charging the accused with a conspiracy " to commit " the offence of criminal breach of trust, a second conspiracy " to abet " the commission of that offence, a third conspiracy " to act together with a common purpose for or in ' committing ' criminal breach of trust " and a fourth conspiracy where the accused had agreed to act together with a common purpose " of abetting " criminal breach of trust of money of the Bank. Counsel for the accused stated that the accused were entitled to know whether it was a conspiracy to *commit* the offence of criminal breach of trust, or whether it was a conspiracy to *abet* the commission of criminal breach of trust that they are charged with. His position was that the words " did agree to commit or abet " contained two conspiracies and the words " and to act together with a common purpose for or in committing or abetting criminal breach of trust " contained two other conspiracies. It may be convenient for me to state, parenthetically, at this point, that the word " and " in the words " and to act together " was deleted from this count on the application of Mr. Kannangara and the words " or agreed " substituted for the word " and ". Mr. Chitty argued that the amendment made no difference and that it still meant a case for four conspiracies being " lumped together " in one single count. Further more he stated that it was not at all clear who it was that the accused conspired together to abet. Was it to abet one another, and if so which of them , or was it to abet another person who was no party to a conspiracy or was it to abet some unknown person ? He further contended that the count, in so far as it referred to abetment, was bad for vagueness and for want of particulars. Counsel for the other accused joined him in this objection.

A second objection taken by all Counsel for the defence was that counts 7 and 8 could not be joined in one and the same indictment because each of these counts alleges the commission of an offence separate and distinct from the conspiracy charged in count No. 1. He pointed out that count No. 1 has no reference whatsoever to the falsification of documents, that none of the other accused, besides the first accused, are involved in counts 7 and 8 and that they really constitute two separate indictments inserted in the indictment containing the other charges.

Whilst he did not challenge the legality of count 3 he stated that the accused were embarrassed by the want of particulars of the mode of abetment.

Mr. Issadeen Mohamed, on behalf of the 3rd accused, took a further objection to count 3—an objection which was later adopted by the Counsel for the other accused too—that as far as any charge of abetment is concerned the provisions of section 168 (2) of the Criminal Procedure Code did not apply ; in other words, that in regard to abetment the prosecution should select any three items and charge the accused with having abetted the offence of criminal breach of trust in respect of those three specific items only and not more, and that count 3 therefore was defective and bad in that it sought to charge all the accused with having abetted the 2nd accused in regard to criminal breach of trust of a gross sum between two terminal dates. The judgment of the Court of Criminal Appeal in the case of *King vs. M. E. A. Cooray* (1950/51) N. L. R. 433 was the sheet-anchor of all accused in regard to all the objections, different parts of the judgment being relied on for the different objections.

Mr. Kannangara, Crown Counsel, in his reply, dealt with Mr. Issadeen Mohamed's objection first. His answer was that the position in *Cooray's case* was entirely different in that the evidence ultimately showed that the abetment was not in pursuance of a single conspiracy which preceded the offence of criminal breach of trust charged there, but that an analysis of the evidence showed that there had been a number of separate abetments, whereas the case for the Crown in the present matter is that all the accused put their heads together in one single common plan to misappropriate the money of the Bank, and that in the nature of the facts here and the situation of the parties to the conspiracy, it was a part of the common plan—to be inferred from the conduct of the several accused—that each of the accused was to play a part of either a principal perpetrator or a subsidiary role of an abettor according to the needs of the changing situation from time to time. In other words his case is that there was a single conspiracy in furtherance of which at different stages the first, third, and fourth accused abetted the 2nd

accused in the misappropriation and that other stages the first accused furthered the common objective of misappropriation by falsifying the documents. In that view of the case for the prosecution he stated that there could be no objection taken to either count 3 or to count 7 or 8. He further argued that the same facts may constitute the offences of conspiracy under section 113B and also the offence of abetment under section 102 of the Penal Code and that it is permissible to join those charges in one and the same indictment in view of the provisions of section 180 (2) of the Criminal Procedure Code.

I agree with the contention of Crown Counsel in regard to the objection to counts 3, 7 and 8. In regard to the further objection on the score of want of particulars of the mode of abetment in count 3, Mr. Kannangara's reply was that the abetment was in one or more of the three methods laid down in section 100 and that any one or more of the methods of abetment set out in that section were adopted according to the needs of the changing situation.

In a case of an alleged conspiracy between several people, which is spread over the greater part of an year, and in the course of which numerous sums are alleged to have been misappropriated and replaced from time to time, and where the several persons who are alleged to be executing the common design play different parts at different times to carry out the object of the conspiracy, it is hardly to be expected that it would be possible to particularise to such a degree as to be able to say precisely what particular act was committed or what particular mode of abetment was adopted by any of the accused at any given point of time in regard to any one or more of all the numerous items alleged to have been misappropriated. It could not be reasonably be expected that evidence would be a cinematographic reproduction of every single scene and incident of the nefarious drama down to the last detail.

The objection to the first count was answered by Mr. Kannangara on the basis that the Crown alleged one single conspiracy between all the accused in which they put their heads together and agreed to act with one single common purpose of design, namely, to misappropriate the money of the Bank and that the very nature of the case the agreement involved the necessity of some of the accused playing the principal role and others abetting them in regard to some items and that at other times those who played the minor role should play the major role; in other words the nature of the common objective was such that it was not possible antecedently to allocate to each separate accused a definite part to play, but that the very necessities of the case required an agreement between all the accused that each should be prepared to play whatever role the necessities of the moment required, and that there was but one single conspiracy to give effect to which the various accused committed various offences set out in the remaining seven counts of the indictment. Mr. Kannangara himself partly relied on *Cooray's case*, namely, that part of the judgment which analyses section 113A and divides it into two limbs only and not into four, the point made by Mr. Kannangara being that the judgment of Gratiaen, J. does not further subdivide each limb and make the agreement to *commit* an offence one conspiracy, and an agreement to *abet* the commission of an offence a different conspiracy requiring a separate charge. The arguments reached such a degree of nicety that in reply to this contention Mr. Chitty pointed to the fact that the words " to commit an offence " and the words " or to abet an offence " were italicised by Gratiaen, J. and that therefore it indicated that the first limb of the section was dealing with two different conspiracies. I do not think that any such inferences as either set of Counsel wanted to be drawn could be drawn from such niceities as were resorted to at the Bar. The plain fact of the matter seems to be that the question which has arisen in this case was not raised or considered in *Cooray's case*. The substantial point decided in that case was that the indictment was bad as it did not allege *an agreement* between the accused to act together in the manner and for the purpose specified in the indictment. It would perhaps not be too much to say that perhaps if the little word " to " had appeared in the second line of section 113A (1) so as to make it read " If two or more persons agree to commit or abet or *to* act together....." instead of the way in which it does read. The wealth of talent and argument expended in *Cooray's case* might have been reserved for some other occasion. Further more the present point was not necessary to be decided in that case as omission of words indicating an *agreement* to act together with a common purpose etc.....was considered sufficient to quash that indictment.

A consideration of the historical origin of section 113A by that learned Judge and his inclusion in his judgment of Howard, C.J's view in the *King vs. Andree*, 42 N. L. R. 495 that the elements of the English Law of criminal conspiracy have been substantially introduced into our Penal Code (though with certain variations), support the view that under our law as it now stands it is the agreement *per se* to commit or abet a criminal offence which is intended to be

penalised whether or not overt acts follow the conspiracy, so long as existence of conspiracy can be proved. The different acts of the various parties which may follow the conspiracy and therefore help to disclose it—for it is very seldom that direct evidence of a conspiracy is available for its proof—are themselves really no part of the conspiracy, but only evidence of it. It seems to me that it is the common concurrence of many minds—of more minds than one—with a view to achieving an object which is an " offence " under our law that constitutes criminal conspiracy under the Penal Code. (Agreements in respect of unlawful acts which are not offences or agreements to perform lawful acts by unlawful means are not caught up in our section). It is therefore permissible to derive guidance from English authorities on the subject of criminal conspiracy. As was pointed out in the *King vs. Aspinall* (1872) 2 Q. B. D. 48, the offence of conspiracy is complete when once the agreement is reached between the parties; nothing need be done to give effect to it because it may turn out that the conspirators may later repent of it and desist from it or their attempt may be foiled just before they put their plan into operation, or they may fail in the attempt, " nevertheless the crime is complete and was completed when they agreed ". Any acts done in pursuance of an agreement only furnish evidence from which the pith and essence of the offence are revealed, or may be inferred.

Mr. Kannangara relied mainly on the case of *King vs. Ponnusamy Sivapathsunderam*, 44 N. L. R. 13. There the appellant and his co-accused were charged with having acted together in " committing or abetting the offences of murder " of five specified persons and they were therefore alleged to be " guilty of the offence of conspiracy to commit or abet the said offence of murder....." The same count proceeded to say that in pursuance of the said conspiracy one of the conspirators, who was named but who was dead at the date of the trial, did commit murder by causing the deaths of certain persons and ended up by stating that the deceased conspirator, who was said to be the murderer as also the appellant and his co-accused all thereby committed the offence of conspiracy punishable under section 113B read with section 296 and section 102 of the Penal Code. The basis of the case for the Crown there, as here, was the allegation of a single conspiracy between all the accused and their deceased co-conspirator. The Court of Criminal Appeal held that that one count in the indictment was not illegal either on the ground of a multiplicity of charges or on the ground that the accused and the deceased co-accused were charged with the offence of conspiracy to *commit* murder as well as to *abet* the commission of murder. Counsel for the appellant in that case contended that under our law there was no offence of conspiracy, as such, simpliciter. The report of his argument shows that he further urged that a conspiracy to commit murder and a conspiracy to abet murder are two separate and distinct offences and cannot be included in the same charge on the principle that a man cannot be charged as an abettor of the very offence of which he is charged as the perpetrator.

Soertsz, J. who delivered the judgment of the Court, pointed out the entirely different position both under our Penal Code and the Indian Penal Code, because both now have a distinct offence of conspiracy, each of the co-conspirators " taking, it may be, different individual parts and yet being liable as co-conspirators to be punished in the manner laid down by section 113B.....for all the matters alleged are ' parts of one endeavour ' ". The multiple murder committed by *one* of the co-conspirators resulted in all his co-conspirators also being charged with a conspiracy to *commit* or *abet* those murders although the co-conspirators had no complicity in those murders.

The principle that seems to emerge from that case is that once there is a charge of conspiracy to commit a certain specified offence all the accused can be charged not only for that conspiracy but also for the various criminal offences committed by the different conspirators individually, or abetted by some of them and committed by others of them, even though all the conspirators may not have been aware of or being party to the various individual offences of their co-conspirators, so long as those offences were committed or abetted in pursuance of that same conspiracy. The acts of each in pursuance of the common plan or in furtherance of the conspiracy are the acts of all; each is liable for all the acts of the others done in pursuance of the common concert between them to achieve a pre-conceived end. Every criminal offence of each of the conspirators, to achieve the common end, becomes the act of all even though that particular activity may not have been previously agreed upon or contemplated by the conspirators when they first reached their agreement to achieve their common end. As Kenny puts it, in his Outlines of Criminal Law, " each of the parties have, by entering into the agreement, adopted all his confederates as agents to assist him in carrying it out." One can therefore well see the reason why each conspirator should be made equally liable with all his confederates for the

criminal acts of each and all in furtherance of the common project.

Mr. Chitty replied that this case was no longer of use as an authority in view of the later decision in *Cooray's case* (supra) 51 N. L. R. 433. I cannot agree with that submission. It may be that *Andree's case* is no longer authority on the point on which Soertsz. J's view was not followed in *Cooray's case* but the judgment in *Cooray's case* in no way derogates from the authority in *Andrees' case* as far as concerns the point relied on by Mr. Kannangara.

Mr. Chitty further contended that if the case for the Crown was that there was a single conspiracy the nature of which necessitated that at times some of the accused should play the part of principal perpetrators of the offence of criminal breach of trust of the Bank's money, which was the object of the conspiracy, and at other times play a subsidiary part as abettors, it would be quite sufficient and also unexceptionable if count one merely alleged an agreement to *commit* that offence, and that under a charge so framed none of the accused should object to evidence being led of the various acts of the accused at different times in the course of the period of nine months, some of which were acts of abetments of offences subsidiary to the main objective of the conspiracy and that no prejudice could be caused to any of the accused by such a course being adopted, especially as it would remove from the way the objection which he had taken. None of the Counsel for the other accused took up a different position in regard to this suggestion of Mr. Chitty; presumably they were also of the view that a charge so framed could cover evidence of all the acts of commission or of abetment which are included in either count one or in any of the other counts of this indictment. Mr. Kannangara was chary of agreeing to this way out of the objection taken to count one, and maintained that if evidence of abetment etc., could be led without the presence of the words relating to abetment in count one, there could not in the circumstance of this case be any objection to the other words of count one of the indictment remaining.

On the basis that the Crown alleges a single conspiracy between all the accused I over-rule the objection to count 1, and hold that it is not bad for a multiplicity of charges.

In the result the indictment, as slightly amended, will remain and the trial will proceed accordingly.

Present : GRATIAEN, J. AND GUNASEKARA, J.

S. A. D. J. J. APPUHAMY (Dead) K. MARY NONA AND ANOTHER

S. C. 87/M—D. C. Negombo No. 14631

Argued on : 10th June, 1952.
Decided on :———

Donation—Subsequent birth of illegitimate child to donor—Child legitimated by marriage later—Action by donor four years after to have gift annulled and cancelled—Is the action prescribed—Prescription Ordinance, (Cap. 55) sections 6 and 10.

Held : (1) That the right to have a gift revoked on the ground of the subsequent birth of a child is based on a cause of action " not expressly provided for " in the Prescription Ordinance and therefore comes within the ambit of section 10 of the Ordinance and becomes prescribed within three years from the time when the cause of action has accrued.

(2) That in such a case the cause of action arises as soon the child is born.

Per GRATIAEN, J.—Section 6 of the Prescription Ordinance does not apply for the simple reason that the cause of action involves no " breach " of any obligation by the donee, for it would be facetious indeed to impute any " blame " to him for the happy event which had taken place in the donor's household. In fact, no obligation to restore the property could arise unless and until a decree for cancellation had been pronounced. The decisions of this Court in *Govt. Agent, Western Province vs. Pallaniappa Chetty* (1908) 11 N. L. R. 151 and *Ponnamperuwa vs. Gunasekere* (1921) 23 N. L. R. 235 are distinguishable because they were concerned only with deeds of gift which expressly empowered the donor to revoke the gift *by his own act* and without the intervention of the Court. In such an event, the donee's repudiation of the right of revocation would clearly have constituted a " breach " of the contract giving rise to a cause of action contemplated by section 6.

Cases referred to : *Dawbarn vs. Ryall* (1914) 17 N. L. R. 372.
The Law of Contract in South Africa Vol. 1 pages 432 and 437.
Constantine Steamship Line vs. Imperial Smelting Co. (1942) A. C. 154.
Hirji Mulji vs. Cheong Yue Steamship Co. (1926) A. C. at page 510.
Govt. Agent, Western Province vs. Pallaniappa Chetty (1908) 11 N. L. R. 151.
Ponnamperuwa vs. Gunasekere (1921) 23 N. L. R. 235.

H. V. Perera, Q.C., with *H. W. Jayawardene*, for the defendant-appellant.

N. E. Weerasooria, Q.C., with *Ivor Misso* and *A. Nagendra*, for the substituted plaintiffs-respondents.

GRATIAEN, J.

Under a notarial conveyance P1 dated 15th June, 1940, the original plaintiff, who was an elderly widower, had donated the property to which this action relates to his nephew the defendant. The donation was duly accepted, and the title to the property accordingly passed to the defendant.

The plaintiff was keeping a mistress (the 2nd substituted plaintiff) at the time of the transaction. On 22nd December, 1942, an illegitimate child (the 3rd substituted plaintiff) was born to this union. Very shortly thereafter he decided to regularise his association with the lady concerned, and he married her on 21st January, 1943. In consequence, the child became legitimated.

The plaintiff instituted the present action against the defendant on 26th November, 1947—*i.e.*, more than 4 years after the date of his marriage—to have the deed of gift P1 " annulled and cancelled " by the Court. He claimed that the subsequent birth of the child entitled him to relief from the consequences of his former liberality. As an alternative ground for revocation he pleaded that the defendant had been guilty of " gross ingratitude," but this allegation was not established at the trial and no longer arises for consideration.

Although the deed of gift expressly purported to be " absolute and irrevocable ", it is common ground that under the Roman Dutch Law a donor nevertheless retains—except in the case of remuneratory gifts, dowries, or donations *propter nuptias*—" the discretion and the right to revoke a gift on account of the subsequent birth of children " (*Voet* 39-5-26) or " when natural children have subsequently been legitimated ". (*Voet* 39-5-27).

The learned Judge entered judgment as prayed for in the plaint, and rejected the special defences whereby it was pleaded (*a*) that the cause of action to have a deed revoked on the ground of the subsequent birth of a child did not survive to the donor's legal representatives or heirs after his death, and (*b*) that in any event the action was prescribed.

In the view which I have taken it is unnecessary to answer the interesting question of law raised by the first plea, because in my opinion the learned Judge was not justified in holding that a claim of this nature falls within the ambit of section 6 of the Prescription Ordinance (Cap. 55). It seems to me that an action to have a gift revoked on the ground of the subsequent birth of a child is based on a cause of action " not expressly provided for " in the Ordinance, and therefore becomes prescribed within 3 years from the time when the cause of action has accrued (section 10).

The relevant words of section 6 of the Prescription Ordinance are as follows :—

> " No action shall be maintainable upon any written promise, contract bargain or promise.....unless such action shall be brought within six years *from the date of the breach of such.....written promise, contract or bargain.*"

Before deciding whether these words apply to the present proceedings, it is necessary to examine the precise nature of the common law remedy which is available to a donor in a revocatory action of this kind.

" The law, declaring what the paternal duty in regard to progeny still to be begotten is, takes for granted, contrary to the principles of strict laws (which are in other respects applied to donations) this tacitly presumed condition, namely—' if no children shall subsequently have been born to the donor '....." (*Voet* 39-5-30). The presumption is not rebutted " unless the donor has expressly renounced his right to revoke for that reason " (*Voet* 39-5-31).

Voet explains that " it must not be imagined that a donation is invalidated on account of the subsequent birth of children by the mere operation of law, and that the donor is again forthwith made the owner of the donated property, but rather that this cancellation must be sued for by him, and the donated property must be reclaimed by him by a personal action (*condictio*) ". (39-3-35). The personal action is called into existence on the subsequent birth of the child, which is described as " a purely accidental happening giving occasion for the cancellation ".

In other words, the cause of action arises as soon as the child is born, and the donor may " repent of his liberality " in order that he may fulfil " his obligations of paternal duty ". (*Voet* 39-5-31). When the equitable jurisdiction of the Court to grant *restitutio in integrum* is invoked " by means of the *querula* " (*Voet* 39-5-35), it is left to the discretion of the Judge to determine whether the gift should be cancelled having regard to all the circumstances which were relevant " at the time when the gift was made ". (*Voet* 39-5-32). In other words, the donor must prove that " the conditions are suitable for the revocation of the gift " (*Voet* 39-5-35). It is the Court's decree and not the wish of the donor that operates to invalidate the gift.

Mr. Weerasooria has argued that section 6 of the Prescription Ordinance applies because the relief claimed is for the enforcement of a " tacit condition of the written agreement ". I do not doubt that an action for the enforcement of an implied term or condition of a written agreement may in certain circumstances be regarded as an action to enforce the written agreement itself. *Dawbarn vs. Ryall* (1914) 17 N. L. R. 372. But this does not conclude the question. Even if that be the true theoretical explanation of the basis of a revocatory action with which we are now concerned, the language of section 6, as I read it, seems appropriate only to proceedings for the enforcement of a right which flows directly from the breach of an express or implied corresponding obligation imposed by the contract on the other party to " the written promise, contract, bargain or agreement ". The section is inapplicable where, as has happened in this case, the cause of action proceeds not from such a breach but from some fortuitous supervening circumstance which the law, on equitable considerations, regards as having destroyed the original foundation of the donation so as to call for a judicial determination of its future operation.

The " tacit condition " suggested by Voet as the theoretical explanation of a revocatory action can, in a sense, be equated to a contractual *resolutive condition* which, if subsequently fulfilled, invalidates the contract which was valid at its inception (*Voet* 18-5-1). As *Wessells* explained in *The Law of Contract in South Africa* Vol. 1 pages 432 and 437, " a contract subject to a resolutive or resolutory condition creates a legal bond between the parties, but in such a way that if the condition is fulfilled the legal bond is broken, and the parties are restored as much as possible to their former condition. By the fulfilment of the resolutive condition, the contract ceases to exist ".

But is there any need in the present context to discover some logical explanation for the remedy which the Roman Dutch Law recognises in revocatory actions? As in the well-known " frustration " cases in commercial transactions, some may explain the remedy by speaking of the disappearance of the assumed foundation of the basis of the contract, others by reading an implied term into the written instrument. *Constantine Steamship Line vs. Imperial Smelting Co.* (1942) A. C. 154. Lord Sumner would perhaps describe it as " a device by which the rules as to absolute contracts are reconciled with a special exception which justice demands." *Hirji Mulji vs. Cheong Yue Steamship Co.* (1926) A. C. at page 510. Suffice it to say in the words of Lord Simon that, " whichever way it is put, the legal consequence is the same ".

Section 6 of the Prescription Ordinance does not apply for the simple reason that the cause of action involves no " breach " of any obligation by the donee, for it would be facetious indeed to impute any " blame " to him for the happy event which had taken place in the donor's household. In fact, no obligation to restore the property could arise unless and until a decree for cancellation had been pronounced. The decisions of this Court in *Govt. Agent, Western Province vs. Pallaniappa Chetty* (1908) 11 N. L. R. 151 and *Ponnamperuwa vs. Gunasekere* (1921) 23 N. L. R. 235 are distinguishable because they were concerned only with deeds of gift which expressly empowered the donor to revoke the gift *by his own act* and without the intervention of the Court. In such an event, the donee's repudiation of the right of revocation would clearly have constituted a " *breach* " of the contract giving rise to a cause of action contemplated by section 6. In this case there was no such breach, and section 3 of the Ordinance applies because no special provision has been made for a cause of action of this kind. If that be the correct view, it was conceded in argument before us that the action was prescribed. I would therefore set aside the judgment appealed from and dismiss the plaintiff's action with costs in both Courts.

Set aside.

Present : GRATIAEN, J. AND PULLE, J.

THE KING vs. DON CHARLES GUNATUNGA

S. C. No. 100—*D. C.* (*Cril*) *Panadura Case No.* 176

Argued on : 18th January, 1952.
Decided on : 31st January, 1952.

Misjoinder of charges—Public Officer entrusted with money—Shortage of money so entrusted—Charges of criminal breach of trust under section 392 *A of Penal Code—Can a charge of falsification of accounts under section* 467 *of Penal Code be joined—Legality of such joinder—Criminal Procedure Code, section* 168—*Burden of proving charge under section* 392 A.

Held : (1) That upon a charge under section 392A of the Penal Code, the burden rests on the prosecution to prove the ingredients of the offence of criminal breach of trust as defined in section 388 of the Penal Code, and that burden so far as the element of dishonesty is concerned, is *prima facie* discharged by the failure on the part of the public officer to produce the money shown in the accounts kept by him or to account therefor.

(2) That a finding of dishonesty on the evidence taken as a whole being a pre-requisite to a conviction under the section, the joinder of a count in the same indictment for making false entries with intent to defraud by concealing misappropriation is not illegal, as the falsification is so intimately connected with the misappropriation, as to form a single transaction.

Cases referred to : *King vs. Ragal* (1902) 5 N. L. R. 314.
Somander vs. Uduma Lebbe (1924) 24 N. L. R. 146.

Dr. Colvin R. de Silva, with *T. W. Rajaratnam*, for the accused-appellant.
Boyd Jayasuriya, Crown Counsel, for the Attorney-General.

PULLE, J.

The only point of substance urged on behalf of the appellant is that there has been a misjoinder of charges in the indictment. The appellant was at the time material to the case the post-master in charge of the Ingiriya Post Office. On the 27th June, 1950, an examiner of post office accounts, duly authorised for that purpose, made a demand on the appellant to produce a sum of Rs. 37,698·58 shown to be due to the Crown in the accounts kept by him. The appellant's failure to produce the money was the subject of the first charge against him under section 392A of the Penal Code. The second, third and the fourth charges alleged that in the course of the transaction set out in the first the appellant, with intent to defraud, made false entries in accounts sent by him to the head office. It is not necessary to refer in detail to the particulars set out in the charges relating to falsification. The case for the prosecution was that the falsification was part of a scheme to keep the head office ignorant of the misappropriation of the sum of Rs. 37,698·58, which was the subject of the first charge.

No objection was taken at the commencement of the trial on the ground of misjoinder of charges but at a later stage it was submitted that the joinder of the second, third and fourth counts with the first was illegal for the reason that the alleged falsification had no connection whatsoever with a mere failure to produce a sum of money, when the appellant was called upon to do so by an authorised officer, and that the irrelevancy of the falsification to any issue arising under section 392A rendered it impossible to treat the falsification and the mere failure to produce the money as parts of the same transaction. The learned trial Judge overruled the objection. Thereafter the prosecution withdrew the second and the third counts and the trial proceeded on the remaining counts. The reason given by the prosecution for the withdrawal of the counts referred to was to meet an allegation of embarrassment by the defence. It is not, however, easy to reconcile the withdrawal by the prosecution of the second and third counts with the retention of the fourth count.

At the close of the case for the prosecution the appellant was called upon for his defence and he gave no evidence. The learned District Judge convicted the appellant on both counts and sentenced him on the first count to one year's rigorous imprisonment and to pay a fine of Rs. 1,000 in default six months' rigorous imprisonment and to one year's rigorous imprisonment on the fourth count, the sentences to run concurrently. At the hearing of the appeal learned Counsel for the appellant conceded, and in my opinion rightly, that if an essential ingredient of an offence under 392A of the Penal Code

is the dishonest conversion of the money which the public officer concerned fails to produce when demand is made by a duly authorised officer and if, further, accounts had been falsified to conceal such misappropriation, the dishonest conversion and the falsification could be regarded as one transaction and that a joinder of a charge under section 392A with charges of falsification would not be illegal.

Dr. Colvin R. de Silva repeated the argument be put forward in the trial Court. When the bare wording of section 392A is examined without reference to section 388 and without staying to consider the reason for the enactment of the new section there is much to commend the argument that the element of dishonest conversion essential to the offence of criminal breach of trust, as defined in section 388 of the Code, is not imported into the provisions of section 392A. This very contention was, however, urged by the Crown in two reported cases and was rejected by this Court. In the case of *King vs. Ragal* (1902) 5 N. L. R. 314 Bonser, C.J., said :—

> " It was sought to be argued that this Ordinance (*i.e.*, Ordinance No. 22 of 1889 which first enacted the section which is now numbered as section 392A of the Penal Code) altered the law in respect of criminal breach of trust in its most essential particular. To constitute the offence of criminal breach of trust, you must find dishonesty. In my opinion this Ordinance did not intend to make a man a criminal who had no guilty or dishonest intent : *it simply intended to facilitate proof of dishonesty, which it is often difficult to prove.* Of course, if, as in many cases it occurs, a person has falsified his accounts, then you have at once evidence of dishonesty."

This case was followed by Porter, J., in *Somander vs. Uduma Lebbe* (1924) 24 N. L. R. 146. We were asked to hold that the decision in *King vs. Ragal* (1902) 5 N. L. R. 314 was wrong as the learned Chief Justice had travelled beyond the plain words of section 392A and read into it provisions which only the Legislature could have inserted. The substance of section 392A was taken from section 1 of Ordinance No. 22 of 1889 which is described as " An Ordinance relating to criminal breach of trust by public servants in this Colony ". As the law stood at that time it was a matter of utmost difficulty where a shortage of money in the hands of a public servant was discovered to specify when and what portion of the money which he is unable to account for was misappropriated. Even if the prosecution could satisfy the Court that various sums of money represented by the shortage were misappropriated between two specified dates, a charge of criminal breach of trust could not be brought home. It was only in 1919 (vide section 7 of Ordinance No. 31 of 1919) that section 168 of the Criminal Procedure Code was amended by the addition of sub-section (2) which reads :—

> " When the accused is charged with criminal breach of trust or dishonest misappropriation of money, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed without specifying particular items or exact dates, and the charges so framed shall be deemed to be a charge of one offence within the meaning of section 179.
>
> Provided that the item included between the first and last of such dates shall not exceed one year."

I may in passing mention that it was by the Criminal Procedure Code (Amendment) Ordinance, No. 57 of 1947, that section 168 (2) was further amended by extending it to misappropriation of all manner of " Movable " property.

Again, if an examination of the accounts revealed a systematic falsification of entries by a public officer pointing to an embezzlement, the extent of which could only be a matter of speculation he could not have been charged with falsification because section 467 of the Penal Code was then not in force. It was added to the Code in 1903. Therefore, as the law stood in 1889 one could not say that Bonser, C.J., was wrong in holding that by enacting 392A the Legislature did no more than facilitate proof of dishonesty which is an essential element that the prosecution has to establish for a conviction on a charge of criminal breach of trust. In other words, upon a charge under section 392A the burden rests on the prosecution to prove the ingredients of the offence of criminal breach of trust as defined in section 388 and that burden, so far as the element of dishonesty is concerned, is *prima facie* discharged by the failure on the part of the public officer to produce the money shown in the accounts kept by him or duly to account therefor. A finding of dishonesty on the evidence taken as a whole is a pre-requisite to a conviction. In this view of the matter the false entries in the present case were so intimately connected with the misappropriation that the misappropriation and the falsification could rightly be regarded as a single transaction.

In my opinion the appeal fails and should be dismissed.

GRATIAEN, J.

I agree. In my opinion the Legislature did not intend, by enacting section 1 of Ordinance No. 22 of 1889 (which has since been incorporated in Chapter 17 of the Penal Code) to create a new offence, also entitled " criminal breach of trust ",

containing elements separate and distinct from the elements of the substantive offence defined in section 388 of the Code. As my brother points out, the purpose of section 392A is merely to facilitate, in the case of public servants entrusted with public funds, proof of the commission of an offence defined in section 388 and punishable, as an aggravate form of that offence, by section 392. Proof of the ingredients specified in section 392A furnishes *prima facie* evidence of the dishonest misappropriation or conversion of the missing funds so as to establish the commission of " criminal breach of trust " defined in section 388. *This does not mean that the accused is debarred from setting up any defence which would normally be available to a person charged with criminal breach of trust.* If, for instance, he can establish facts sufficient to create doubts as to the existence of the element of *dishonesty*, he is entitled to an acquittal. Again, as Bonser, C.J., indicates in *King vs. Ragal* (1901) 5 N. L. R. 314, it would afford a good defence if the evidence, taken as a whole, fails to satisfy the trial Judge that, notwithstanding the shortage of the cash involved, there had in fact been a *conversion* of the public funds. I think, however, that the headnote to *King vs. Ragal* (1901) 5 N. L. R. 314 goes too far when it states that " to justify a conviction there must be direct evidence (that is, presumably, in addition to the facts specified in section 392A) of dishonesty or such conduct on the part of the accused as would lead to the inference of dishonesty or dishonest intention ". On the contrary, section 392A is specially designed to relieve the prosecution of the burden of proving any facts other than what is expressly mentioned in the section in order to establish *prima facie* the dishonest conversion of public funds on a date or dates which the Crown is not required (and may well find it impossible) to specify. Indeed, by a statutory fiction, section 392A regards the date on which the accused " failed to pay over or produce.....or to account for " the missing funds as the date of the actual commission of the substantive offence, namely criminal breach of trust by a public servant.

Dr. Colvin R. de Silva concedes that, if section 392A is to receive the interpretation which my brother Pulle and I have adopted, no plea of misjoinder arises. I agree therefore that the appeal must be dismissed.

Appeal dismissed.

Present : ROSE, C.J. AND GUNASEKARA, J.

MILLER vs. MURRAY

S. C. No. 440—*D. C.* (*F*) *Kandy No.* 3818

Argued on : 13th June, 1952.
Decided on : 10th July, 1952.

Jurisdiction—Defendant residing outside Ceylon—Service of summons out of island duly effected —Action for breach of promise of marriage—Section 9, *Civil Procedure Code—Does it apply only to persons domiciled in Ceylon* ?—*Civil Procedure Code, sections* 9, 69.

The plaintiff-appellant sued the defendant-respondent to recover damages for breach of promise of marriage. Service of summons on the defendant-respondent, who had been residing outside Ceylon, was duly effected, in accordance with the provisions of section 69 of the Civil Procedure Code.

A preliminary issue was raised as to whether the Court had jurisdiction to hear the case, as the defendant was living outside Ceylon, and this was decided in favour of the defendant.

The plaintiff appealed, and the appeal was argued on the basis that, if the matter was justiciable in Ceylon at all, the Kandy District Court was the appropriate Court.

Held : (1) That there was no good cause for accepting the respondent's contention that section 9 (Civil Procedure Code) applied only to persons domiciled in Ceylon.
(2) That, in consequence, the matter was justiciable in Ceylon.

Per ROSE, C.J.—Moreover in a comparatively recent case in *re Liddell's Settlement Trusts* (1936) 1 Ch. Div. 365, Romer, L. J., has said, at page 374, in considering the effect of Order X1 Rule 1 (*c*) (of the United Kingdom Supreme Court).

" The moment a person is properly served under the provisions of Order X1 that person, so far as the *jurisdiction of this Court is concerned,* is precisely in the same position as a person who is in this country."

Cases referred to : *Worman & Co. vs. Noorbhai* 15, N. L. R. 355.
Emanuel vs. Symon (1908) 1 K. B. 302.
Sirdar Gurdyan Singh vs. The Rajah of Faridkote, (1894) A. C. 670.
Schibsby vs. Westenholz, L. R. 6 Q. B. 155.
Re Liddell's Settlement Trusts (1936) 1 Ch. Div. 365.

H. V. Perera, Q.C., with *P. Somatilekam* and *S. Sharvananda* for the plaintiff-appellant.

N. E. Weerasooria, Q.C., with *E. B. Wikramanayake, Q.C.*, with *Ivor Misso* and *P. Colin Thome* for the defendant-respondent.

ROSE, C.J.

The appellant seeks to recover damages from the respondent for breach of promise of marriage. The matter went to trial on the following issues :

1. Did the defendant by his letters dated 19th November, 1947, 9th December, 1947, 29th June, 1949, 11th July, 1949, 9th August, 1949, and 19th September, 1949, promise to marry the plaintiff ?
2. Has the defendant repudiated his said promise and refused to marry the plaintiff ?
3. If so, what damages is the plaintiff entitled to ?
4. In view of the fact that the defendant has been residing outside Ceylon from April, 1948, has this Court jurisdiction to hear the plaintiff's action ?

The fourth issue was heard as a preliminary issue of law.

The appeal was argued on the basis that if the matter was justiciable in Ceylon at all the Kandy District Court was the appropriate Court.

Service of summons out of the island was duly effected, having been permitted under section 69 of the Civil Procedure Code on the ground, no doubt, that the cause of action arose in Kandy, or that the contract sought to be enforced was made there. (Section 9 of the Code).

The respondent contends that section 9 applies only to persons domiciled in Ceylon and purports only to allocate jurisdiction as between the various Courts of the island in respect of such persons. He submits that the words " subject to the pecuniary or other limitations prescribed by any law " introduce the limitations of international law and should not, as the appellant argues, be taken to refer exclusively to municipal law.

The respondent relies in the main upon two decisions, *Worman & Co. vs. Noorbhai* 15, N. L. R. 355 and *Emanuel vs. Symon* 1908, 1, K. B. 302. It is to be noted that in the former case the question to be decided was whether a judgment obtained against the defendant in the Court of Small Causes of Calcutta was enforceable in Ceylon. On this matter Lascelles, C.J. said as follows :—

> " The argument on appeal principally turned on a point which does not appear to have been urged before the learned District Judge. But as the consideration of that argument involves no further finding of fact, I think we cannot refuse to entertain that argument. Now it is urged by Mr. Hayley that, accepting the findings of the District Judge on the two points in issue, namely, *the competence of the Court in India* and the service of the summons in Colombo, the present action is still one that is not maintainable on general principles of international law. It is argued that, inasmuch as the defendant was not domiciled within the jurisdiction of the Indian Courts, and was not resident there at the time of the action against him, and did not appear to the process or agree to submit to the jurisdiction of the Court of Small Causes, he is not bound by the judgment of that Court. The authorities which Mr. Hayley has cited to us are explicit on the point, and being authorities on questions of international law they are binding on us. In the case of *Emanuel vs. Symon* the facts were on all fours with the facts of the present case. The defendant had been in Western Australia and had carried on business there. He then left Australia and went to live in England. His former partners then obtained a judgment against him in the Australian Court. The defendant was served with the writ in England, but he entered no appearance, and did not defend the action. The Australian Court gave judgment against him, and an action was brought in England against the defendant to enforce the Australian decree, and it was held, on the grounds that I have mentioned, that the defendant was not bound by the decree of the Australian Court. In an Indian case, *Sirdar Gurdyan Singh vs. The Rajah of Faridkote*, (1894) A. C. 670 the same principles were enunciated. I regard these judgments as binding on us, and I would set aside the judgment of the District Court and dismiss the action against the defendant."

It is to be noted that neither in that case nor in *Emanuel vs. Symon* (supra) was the point taken that the original judgment, in Calcutta, or Western Australia, as the case may was bad in itself. Indeed the contrary would seem to be assumed and in *Sirdar Gurdyan Singh vs. The Rajah of Faridkote*, (supra) Lord Selborne said at page 684 :—

> " In a personal action, to which none of these causes of jurisdiction apply, a decree pronounced in absentem by a foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity. He is under no obligation of any kind to obey it ; and it must be regarded as a mere nullity by the Courts of every nation except (*when authorized by special local legislation*) *in the country of the forum by which it was pronounced.*"

In other words, the jurisdiction of a Court of any particular State must depend upon the local municipal law and is unaffected by the consideration as to whether a judgment once obtained is enforceable in the Courts of a foreign state. That latter question will of course depend upon international law or the local municipal law of the foreign State in question. This distinction

would seem to be explained by Blackburn, J. in *Schibsby vs. Westenholz* L. R. 6 Q. B. 155 at page 159.

> " Should a foreigner be sued under the provisions of the statute referred to, and then come to the Courts of this country and desire to be discharged, the only question which our Courts could entertain would be whether the Acts of the British Legislature, rightly construed, gave us jurisdiction over this foreigner, for we must obey them. But if, judgment be given against him in our Courts, an action were brought upon it in the Courts of the United States (where the law as to the enforcing foreign judgments is the same as our own), a further question would be open, viz., not only whether the British Lagislature had given the English Courts jurisdiction over the defendant, but whether he was under any obligation which the American Courts could recognize to submit to the jurisdiction thus created. This is precisely the question which we have now to determine with regard to a jurisdiction assumed by the French jurisprudence over foreigners."

Moreover in a comparatively recent case in *re Liddell's Settlement Trusts* (1936) 1. Ch. Div. 365 Romer, L.J., has said, at page 374, in considering the effect of Order X1 Rule 1 (*c*) (of the United Kingdom Supreme Court) :—

> " The moment a person is properly served under the provisions of Order X1 that person, so far as the *jurisdiction of this Court is concerned*, is precisely in the same position as a person who is in this country".

It seems to me, therefore, that there is no good reason for accepting the respondent's contention that section 9 applies only to persons domiciled in Ceylon. The appellant is, in my opinion, entitled to succeed in her appeal. The appeal is therefore allowed, but, as the merits have not yet been adjudicated upon, the matter must be remitted to the District Court for determination according to law. The respondent will pay the costs of this appeal and of the hearing in the District Court on 13th March, 1951.

Gunasekara, J.

I agree.

Appeal allowed and sent back.

IN THE PRIVY COUNCIL

Present : Lord Normand, Lord Tucker, Lord Asquith (of Bishopstone), Lord Cohen.

MOHAMED AKBAR ABDUL SATHAR vs. W. L. BOGTSTRA *et al*

Privy Council Appeal No. 19 *of* 1951 *from the Supreme Court of Ceylon*

Decided on : 26th May, 1952

Contract—Appellant employed by respondent on a fixed salary—Oral agreement for payment of commission—Finding of Trial Court—When may Appellate Court interfere?—Meaning of " share of profits ", " commission ", bonus'—Evidence Ordinance, sections 34, 37.

The appellant who was employed by the respondent on a fixed salary alleged that he was promised a commission on the net profits of the business for each year; certain sums of money described as " commission " " bonus " had been credited to the appellant in the books of the respondent.

The trial Judge found for the appellant on his claim to a commission based largely on his estimate of the credibility of the appellant and the respondent respectively.

The Supreme Court set aside the order of the trial Judge on the ground of misdirection in that the finding was based on his disbelief of the respondent by reason of ' respondents ' contradictions, and that those contradictions in their view amounted to nothing more than an incapacity to explain or remember certain facts.

Held : (1) That the order of the Supreme Court should be set aside as their Lordship's find it impossible to agree with the reasons given by the Supreme Court, as in their Lordship's view the judgment of the trial Judge indicates that his acceptance of the appellant's story was based largely on his impression of the demeanour of the appellant.

(2) That objections cannot be taken at the Privy Council to evidence admitted at the trial and in the Court of Appeal.

The terms " share of profits " and " commission " are expressions relating to a legal right, while " bonus " refers generally to an ex-gratia payment.

Mr. D. N. Pritt, Q.C., with ———for the appellant.
Mr. Fox Andrews, for the respondents.

Judgment delivered by LORD COHEN

The appellant entered the service of the respondents in 1937 at a salary of Rs. 150 per month plus a " dearness allowance " which their Lordships understand to mean a cost of living allowance. It was also the practice of the respondents to give their employee an X'mas bonus.

The business of the respondents was divided into departments the appellant being employed in a department which is called sometimes the Sundries Department, sometimes the Import Department and sometimes the General Import and Sundries Department. According to the appellant he saw opportunity of developing a particular kind of business described as indent business and approached the 1st respondent towards the end of 1939 with the suggestion that he (the appellant) should receive an addition to his remuneration. He alleges that an agreement was reached that he should receive in addition to his fixed salary and dearness allowance an eighth share of the nett profits of his department. He contends that this agreement remained in force until he left the service of the respondents on the 31st December, 1944, subject only to two variations : (*a*) that in 1940-41 there was imposed for a short time a 10 per cent. cut in fixed salary and (*b*) that it was agreed early in 1944 that his fixed salary including dearness allowance should thereafter be Rs. 500 per month.

The respondents admit the allegations as to the fixed salary but deny that the appellant had any legal claim to anything over and above it.

The evidence establishes beyond dispute that the appellant received or was credited with certain sums in the books of the respondents at the end of each of the financial years ending on the 31st March, 1941, 1942 and 1943 respectively, the amounts involved being in 1941 Rs. 5,000, in 1942 Rs. 5,000 and in 1943 Rs. 4,000. These sums were in addition to his fixed salary, any X'mas bonuses and a special bonus given to all employees to celebrate the silver jubilee of the 2nd respondent but the respondents allege that they were *ex gratia* payments as a reward for hard work and that the appellant could not have sued to recover them had they not been paid.

On the 29th November, 1944, the respondents wrote to the appellant purporting to confirm an agreement that he should resign from the firm at the end of 1944 and stating that his services would not be required after the 31st December, 1944. The appellant denies that any such agreement was made but he did in fact leave the respondents' service on the 31st December, 1944.

Without waiting for that date his proctor wrote on his behalf on the 4th December, 1944, a letter which did not mention the specific claim to an eighth share of the profits of his department but contained the following paragraphs :—

> " I am prepared to advise my client without prejudice to terminate his services immediately, waiving salary for the current month and bonus, on condition that you settle what is due to him as commission immediately.
>
> My client joined your firm in the Import Department in 1937 on a salary of Rs. 150 per month plus an annual bonus. By 1940-41, however, by my client's unquestioned efficiency and business knowledge, experience and general acumen the firm was able to turn out a substantial profit out of which you paid my client Rs. 5,000 as commission he had earned and was lawfully entitled to on the basis agreed upon. In 1941-42 the turn over was again just as satisfactory and you paid my client a similar amount. In the following year 1942-43 trading conditions suffered a slight set-back and you were able to pay my client only Rs. 4,000.
>
> It was during that period that Mr. Sathar on your behalf was away from Ceylon for 8 months and it is clear that it was a case of cause and effect : but in 1943-44 you netted a profit in the neighbourhood of 2½ lakhs and there is due to my client as even minimum commission a sum of Rs. 25,000 more or less, which I have to request you to forward me at your earliest."

The respondents by their proctor on the 15th December, 1944, repudiated any liability for anything beyond the fixed salary to the end of December, 1944.

On the 22nd December, 1945, the appellant issued his plaint claiming in effect (*a*) fixed salary of Rs. 500 for the month of December, 1944 : (*b*) damages for wrongful dismissal amounting to three months' salary, *i.e.*, Rs. 1,500 ; (*c*) an account of the profits of his department for the period 1st April, 1943, to the date of his dismissal viz., 31st December, 1944, and payment of a sum equal to one-eighth of such profit ; (*d*) an account of the profits earned by his department in transactions arranged or executed by him before the 31st December, 1944, in respect of goods delivered or performance completed after that date. The case came on for hearing before the District Court, Colombo, on the 28th May, 1947. The appellant gave evidence in support of his plaint in the course of which he definitely asserted that the 1st respondent on behalf of the respondents had made the verbal agreement, alleged in the plaint. He puts in various entries from the respondents' books which he said supported his claim. Thus in the personal ledger (see P 4 and P 5) there appears the following entries :—

" Jan. 4th, 1941, advance against commission —Rs. 2,500.

July 14th, 1941, cash in settlement of commission—Rs. 2,399·53.

Oct. 30th, 1943, cash in settlement of commission—Rs. 8,500."

On the other hand it should be noted that in the same account on the opposite side appears these entries :—

" March 31st, 1941, by bonus, Rs. 5,000.

March 31st, 1942, by bonus, Rs. 5,000.

March 31st, 1943, by bonus, Rs. 4,000."

He also produced two statements of profits of his department which he said had been handed to him by the 1st respondent when they were discussing what he was entitled to for his share of profits. The first (P 6) showed a profit for 1940-41 of over Rs. 57,000. The second showed the profit for the three years 1940-41, 1941-42 and 1942-43 ; the profits for the two latter years aggregating to respectively about Rs. 106,000 and Rs. 40,000. If the one-eighth calculation is applied to these figures the amount arrived at is substantially larger than the amounts actually credited to him in each year and the ratio between these amounts is very different to the ratio of the profits figures for the respective years. The appellant sought to explain these discrepancies by stating that he accepted deductions which the 1st respondent said, ought to be made in respect of such matters as working expenses, excess profits and income tax and that the figures for the last two years were treated as an aggregate.

He also produced two counterfoils which corroborated the entries in the books of the respondents that the Rs. 2,500 paid to the appellant on the 7th January, 1941, was an advance against commission and that the Rs. 2,399·53 paid to him on the 14th July was in settlement of his commission. According to the evidence of the respondents' former book-keeper who was called on behalf of the appellant and was not cross-examined the first counterfoil was in the handwriting of the 2nd respondent and the second counterfoil which was in the book-keeper's handwriting was initialled by the 1st respondent.

The appellant also put in some entries from a day book (P 9) which he had kept in connection with a business formerly carried on by him at Diyatalawa and in which he had, until he closed down that business, made certain entries as to his receipts from the respondents. Under date January 4th, 1941, he records the receipt of Rs. 2,500 as " being part advance on commission due". Under date July 16th, 1941, he records the receipt of Rs. 2,399·53 as " By Hong Kong Bank cheque " and under the same date appear in opposite columns the following entries :—

" B. & De W.'s a/c (M. A. A. S. A/c) To amt. due on commission a/c for the year 1st April, 1940, to 31st March, 1941, to M. A. A. Sathar— 5,000·00.

M. A. A. Sathar, By amt. received from B. & De W. towards Commission for year 1st April, 1940, to 31st March, 1941, based on 1/8th share of a nett profit of Rs. 40,000 for the Sundry Department—5,000·00."

Again under date 20th December, 1941, appears the entry " B. & De W.'s a/c By Hong Kong Bank cheque being advanced towards amount due to me on profit for the year, 1941-42—500·00."

No objection was taken to the admission of these entries.

The 1st respondent was the only witness called for the respondents although the 2nd respondent was living in Ceylon and appears clearly to have been available. The 1st respondent denied the alleged agreement. He admitted that the statement of profits (P 6) was in his handwriting but denied having handed it or the statement of profits (P 8) to the appellant. He gave what the trial Judge thought a wholly unsatisfactory explanation of the purpose for which he had prepared the document (P 6). He denied having told the appellant that Rs. 17,000 should be deducted from the profits shown in P 6 as expenses. He was less explicit in his denials as to P 8 for he says : " I might have given him an idea of the situation when he spoke to me about his bonus ".

He was unable to give any satisfactory explanation as to why the 2nd respondent had entered " advance against commission " in the counterfoil (P 2) and could only say about the entry on 14th July, 1941, " Cash in settlement of commission " that it was a mistake in so far as it used the word " commission ".

Having heard the evidence the learned Judge on the 23rd June, 1947, gave judgment in favour of the appellant except on the issue of damages for wrongful dismissal. As the appellant does not now seek damages for alleged wrongful dismissal their Lordships need not refer again to that issue.

On the main point, viz.: the appellant's claim to a share of profits the learned trial Judge unhesitatingly found for the appellant. As their Lordships read his judgment he bases himself largely on his estimate of the credibility of the appellant and the 1st respondent respectively. On this point he says :—

" Plaintiff gave his evidence quite well. He did not contradict himself on any material point. As for the 1st defendant he was most unreliable in the witness box. He contradicted himself more than once and said things that could not

possibly be true. For a Dutchman he was extraordinary voluble, but it must not be thought that he was handicapped by reason of unfamiliarity with the English language. In fact, his knowledge of English seemed to be very good. He certainly showed a nice appreciation of the word " insistence ". He said with reference to the Diyatalawa business " The books were audited but that was done on my urgent request ". Realising that urgent request was not the correct expression, he added : " On my insistence that was done ".

As between the plaintiff and the 1st defendant I have no hesitation in accepting the word of the former."

He places some reliance on one of the entries in the plaintiff's day book (P 9) for after reading the entry for the 20th December, 1951, he says :

" About the genuineness of this entry there can be no doubt and it proves the plaintiff's statement that the sum of Rs. 500 was not an advance against salary but an advance payment on account of profits."

Again he says : ".....plaintiff's book of account supports the plaintiff's story that the amounts received by him were on account of profits earned by his department and not as bonus ".

From this decision the respondents appealed. Their Lordships do not find it necessary to refer to the notice of appeal further than to point to entries in the appellant's day book (P 9) but merely to its admissibility except as corroboration of the appellant's evidence.

The appeal came before the Supreme Court and on the 25th April, 1949, the Supreme Court (Nagalingam and Gunasekara, J. J.) reversed the decision of the trial Judge and dismissed with costs the appellant's action in excess of the Rs. 500 admitted to be due for salary.

Nagalingam, J. with whom Gunasekera, J., concurred commenced his judgment by stating his view of the law applicable where an Appellate Court is invited to reverse a trial Judge on a question of fact. He said :

" This appeal involves a question of fact. It is a well established principle that an Appellate Tribunal would not ordinarily interfere with the finding of fact of a Court of first instance, but this principle is not without exception. Where the facts are such that the Appellate Tribunal is itself in as good a position as the original Court to sift and weigh the evidence and where in particular the oral testimony has not received in the lower Court that consideration which should have been bestowed on it in the light of the attendant circumstances ' which cannot lie ', the Appellate Tribunal would not feel itself trammelled by the trial Judge's views in reaching on its own a decision on appeal. Besides where the disbelief of a witness expressed by the trial Court is based upon demeanour that is a strong circumstance which the Appellate Court would give full weight to ; but where that disbelief is based on the ground that the witness has contradicted himself and where on examination the contradictions do not amount to anything more than an incapacity to explain or remember after a period of years certain facts, the Appellate Tribunal would be the more unfettered to examine the evidence afresh and arrive at an independent decision."

With that statement of the law (which in substance agrees with the opinion expressed by the House of Lords in *Watt or Thomas vs. Thomas* (1947) A. C. 484) their Lordships are not disposed to quarrel but they are unable to agree that the Supreme Court has correctly applied it to the facts of the present case. Reading the judgment of the trial Judge as a whole their Lordships find it impossible to agree that his disbelief of the 1st respondent was based solely on the ground that the 1st respondent had contradicted himself or that the contradictions amount to nothing more than an incapacity to explain or remember certain facts. Their Lordships consider that the passage from the judgment of the trial Judge which they have cited and indeed his judgment read as a whole indicate that his acceptance of the story told by the appellant was based largely on his impression of the demeanour of the appellant.

It is observed that the Supreme Court dismissed the appellant's action not merely on the ground that he had failed to prove the case he pleaded but also in their acceptance of the truth of the evidence given by the 1st respondent. Mr. Fox-Andrews for the respondents, as their Lordships think wisely, did not attempt to support that portion of the judgment of the Supreme Court. He recognised that the 1st respondent's evidence was full of inconsistences for which no satisfactory explanation could be given. He submitted that the case should be approached on the basis that the 1st respondent's evidence should be ignored and that the oral evidence adduced on behalf of the appellant and that documents before the Court should then be exampled to see whether they established the case which the appellant alleged.

Mr. Fox-Andrews had of course to admit that taking the appellant's oral evidence alone it proved his claim to an eighth share of the profit but he said that when it was examined in the light of the documents which in the language Nagalingam, J. " cannot lie " it would be found that the oral evidence could not be accepted.

As a preliminary he considered the meaning of the three expressions " share of profits " " com-

missions " and " bonus ". The first, he said, is unambiguous. The second he suggested is ordinarily applied to a right to a percentage of the sale price of goods. Both these expressions, he agreed are normally used in relation to contracts giving a legal right to an employee to a share of profits or commission. " Bonus " on the other hands is he said, normally used in relation to an *ex gratia* payment, made at somebody's discretion, in the relevant context at the discretion of an employer.

Their Lordships are not disposed for the purpose of the present case to dispute the correctness of this suggested dictionary subject to the reservation that they think that the expression " commission " is not infrequently used in relation to a commission on profits. The important distinction to bear in mind is in their Lordships' opinion the distinction between " share of profits " and " commission " on the one hand and " bonus " on the other, the two first expressions relating to a legal right, the last referring generally to an *ex gratia* payment.

Turning to the extracts from the respondents' books their Lordships find that the expression " commission " and " bonus " are both used, but in the counterfoils with each of which one or other of the respondents is personally identified the expression used is " commission ". The Lordships are unable therefore to extract from the respondents' books and documents anything which is necessarily inconsistent with the appellant's oral evidence. They agree, however, with Mr. Fox-Andrews that these entries do not of themselves support the vital allegation that the commission to which the appellant is entitled is an eighth of the profits of his department.

For that he is dependent on his verbal evidence and, if they are admissible, on the entries of his day book (P 9). As their Lordships have already said no objection was taken to their admissibility either before the trial Judge or before the Supreme Court, Mr. Fox-Andrews now seeks to exclude them. Mr. Pritt submits that the objection comes too late but he also aruged that in any event they are admissible under Sections 34 and 157 of the Evidence Ordinance (Cap. 11 of the Revised Edition of the Legislative Enactment of Ceylon). These sections read as follows :—

> " 34 Entries in books of account regularly kept in the course of business, are relevant, whenever they refer to a matter into which the Court has to inquire, but such statement shall not alone be sufficient evidence to charge any person with liability."
>
> " 157. In order to corroborate the testimony of a witness any former statement made by such witness, whether written or verbal, relating to the same fact at or about the time when the fact took place or before any authority legally competent to investigate the fact, may be proved."

Their Lordships find it unnecessary to reach a conclusion on this last argument as they are satisfied that they ought not at this late stage to sustain Mr. Fox-Andrews' objection. They have not the advantage of any opinion of the Ceylonese Courts on the point, but they have the fact that the present respondents' counsel in their notice of appeal to the Supreme Court appear to have recognised that the entries would be admissible for corroborating the present appellant's evidence. Their Lordships will assume that this contention of the respondents is well founded. The appellant has given express evidence which if accepted justifies the learned trial Judge's judgment. As their Lordships read that judgment, he treated the entries in P 9 as supporting the veracity of the appellant's evidence and their Lordships consider that he was entitled so to do.

There are certain other matters on which Mr. Fox-Andrews laid great stress, in particular the discrepancy if the appellant was entitled to an eighth of the profits of his department, between an eighth of such profits as shown in P 6 and P 8 and the sums actually paid to the appellant. This criticism has much force, but no doubt it was made to the trial Judge and after considering all the elements, the trial Judge accepted the appellant's evidence. In their Lordships' opinion the Supreme Court applying the principles which they themselves enunciated ought not to have interfered with his conclusion.

Their Lordships would add that however excellent a Judge's note of evidence may be (and the note in the present case appears to their Lordships to have been both fully and carefully made), the cases must indeed be rare where, no transcript being available, the Appellate Court in a case involving the veracity of a witness can properly disturb the finding of fact of the trial Judge who made the note.

There is, however, one subsidiary matter on which in their Lordships' opinion the trial Judge fell into error and that was in allowing the respondents an account of the profits on transactions commenced during the period of the appellant's employment with the respondents but not completed until after the termination of that employment. Their Lordships think that the proper inference from the evidence is that under the agreement between the parties the commission would only be payable on profits of the department which would be brought into the Profit and Loss Account of the business if the financial year of the company ended on the date of termination of the employment.

Their Lordships will therefore humbly advise Her Majesty that the appeal be allowed and the

judgment of the trial Judge be restored subject to the exclusion of the paragraphs decreeing that the respondents do render an account to the appellant of the profits earned by the General Import and Sundries Department in all transactions arranged or executed by the appellant and on all contracts put through by him before the 31st December, 1944, in respect of goods delivered, and or performance completed after the 31st December, 1944, and that in default of rendering the said account of the said profit the respondents do pay to the appellant the sum of Rs. 3,125.

The respondents must pay the costs of the appellant of this appeal and in the Supreme Court of Ceylon.

Appeal allowed.

Present : CHOKSY, A.J.

B. C. KONSTZ vs. SUB-INSPECTOR THARMARAJAH

S. C. No. 293—*M. C. Colombo* (*Jt.*) *No.* 41920

Application in Revision

Argued on : 26th and 27th June, 1952.
Decided on : 30th June, 1952.

Betting—Charge of—Section 10, *Betting and Horse Racing Ordinance—What must be proved under section* 3*—Decoy going back on evidence—Availability of other evidence—Can conviction be sustained* ?

Where the accused was charged under section 10 of the Betting and Horse Racing Ordinance for receiving or negotiating a bet on a horse race and there was evidence to establish that betting on horse racing was going on at the premises and that the accused received the betting slips and negotiated the illegal bet,

Held : (1) That the accused was rightly convicted.
(2) That it is sufficient to prove that a bet was received on a horse race proposed to be run and that it is not necessary to prove that the horses on which the bet is taken actually ran.
(3) That where a decoy goes back on his evidence the Court can convict an accused person provided there is other evidence to establish the charge beyond reasonable doubt.
(4) That where the offence is committed in a place other than the place authorized under the search warrant, the presumption of guilt under the Ordinance is not available and the prosecution must prove the offence in the ordinary way.

Per CHOKSY, A.J.—" That a Judge of the lower Court has not set out all the reasons that may be urged for rejecting a defence does not necessarily mean that he has not considered the defence. So long as the Appeal Court is satisfied that the defence has been examined and that its rejection has not been on grounds that cannot be justified, it cannot be said that the elementary principles of natural justice have not been observed ".

Cases referred to : *Charles vs. Kandiah* (1950) 52 N. L. R. 212.
Iyer vs. Karunaratne (1941) 21 Ceylon Law Weekly.
Dharmaratne vs. Kandasamy (1933) 35 N. L. R. 206.
S. C. 259/J. M. C. Colombo No. 38819.

R. L. Pereira, Q.C., with *N. M. de Silva*, for the accused-appellant.
L. B. T. Premaratne, C.C., for the Attorney-General.

CHOKSY, A.J.

The accused has been charged and convicted of an offence under section 10 of the Betting and Horse Racing Ordinance in that he received or negotiated a bet on a horse race other than a taxable bet in contravention of the Ordinance.

The premises were raided by the Police on the 24th of November last under colour of a search warrant which was issued in respect of premises No. 33, Canal Row, Fort, whereas the premises where the alleged illegal betting is said to have taken place bear assessment No. 33 1/1, Canal Row. The extract from the Assessment Book produced by the accused shows that premises No. 33 was a curio manufactory of the assessed annual value of Rs. 600 upon which the quarterly taxes payable was Rs. 45. The same document shows that premises No. 33 1/1 (which are situated on the upper storey over premises No. 33) was entered in the Assessment Book as a Social Club, the annual value of which is assessed at Rs. 650 with a quarterly tax of Rs. 48·75.

The evidence clearly establishes the contention of Mr. Pereira for the defence that the two premises are separate and distinct and are occupied independently of one another. I am therefore of the view that the search of premises No. 33 1/1 was not authorised by that particular search warrant. The consequence is that the presumption of the guilt of the offence of unlawful betting which is created by the Ordinance is not available to the prosecution. Every fact in relation to the offence has therefore to be proved by evidence in the ordinary way unaided by any presumption.

Mr. Pereira also contended that there was no proof that the three horses mentioned in the betting chits, namely, Mosaki Pasha, Mosul and Midsummer Fair actually ran on the 29th of November last. The case of *Charles vs. Kandiah* (1950) 52 N. L. R. 212 was relied on. In my view that case is not an authority for the proposition that the prosecution must prove that the horse actually ran. The decision of Soertsz, J. in *Iyer vs Karunaratne* (1941) 21 Ceylon Law Weekly points out that it is palpably erroneous to say that it is necessary to prove that the horses in question actually ran. Indeed the very wording of the section 3 shows that the Ordinance contemplates bets on " any horse race which is run or proposed to be run ". All that is necessary therefore is to prove that a bet was received on a horse race proposed to be run.

Mr. Rodrigue, the chief clerk of the Turf Club, has produced the Official Race Book of the Turf Club of the 17th November last and has stated that the race meet of that date was postponed for the 24th November and that the Programme or Race Book intended for the 17th November was used on the 24th. The copy of the Programme produced has an alteration of the date from the 17th to the 24th November. While it is true that there is no proof as to who altered the date, Mr. Rodrigue's evidence clearly establishes, to my mind, that the Programme of the 17th November was a record of the races which were proposed to be run on the 24th November. Mr. Rodrigue was unable to say from his own recollection whether the three horses in question actually ran but that is immaterial, as I have already pointed out.

The question therefore is whether it has been proved beyond reasonable doubt that this particular accused received or negotiated an illegal bet on this occasion.

On reading the entire evidence one is left in no state of doubt whatever that betting on horse racing was going on at the premises in question and that the mere registration of the premises as a " Social Club " was just a blind intended to cover the real purpose for which the premises were being used. Mr. Masquita, who was called for the defence, says that he plays ping pong there daily, although his real vocation in life is to perform in the evenings as a member of the Hot Radio Rhythm Quintet. There is some evidence that there is, in the middle of the raided room, a long green table which was apparently the table at which Masquita played ping pong. There is no evidence of equipment being available at the premises for any other games although a suggestion was thrown out in the course of the cross-examination of one of the police witnesses that there was a small table which might have been a card table. Counsel for the appellant was unable to enlighten me, for the lack of evidence, whether any cakes or tea or other liquid refreshments were available at these premises. There is no evidence either of the qualifications needed for membership. The accused, who is a private tutor, states that he went to these premises on that occasion at about 11 a.m., to read the newspapers. He denied that he received the two betting slips in question or that he put any marks on them.

The prosecution rely on the evidence of a decoy Gunapala and of the plain clothes policeman who followed the decoy as he went to place the bet. The decoy, who is a pavement hawker, was quite clear in his evidence on the first date, namely, the 26th of November, that when he went to the upper storey this accused was seated at a table quite close to the entrance and that he gave the two chits and the marked rupee note to the accused, that it was the accused who initialled the two chits and gave Gunapala one and put the other into the drawer of the table. He was also quite clear that it was the accused who gave him back 20 cents in two coins of ten cents each. He even identified the coins themselves. I understand that it is the practice for those receiving unlawful bets to give a discount of 20 per cent. to their customers. Under cross-examination however on the 11th of December last, he interposed another man mid-way up the stairs between himself and the accused and stated that this man stopped the witness and questioned him and took the chits from the witness and asked the witness to wait till the man went and placed the bet. Gunapala nevertheless stated that he followed the man when he went up the rest of the stairs to place the bets and that the accused was at the table but that, strangely, he did not see the man handing the chits and the money to the accused but that he did see the man come back to him from near the table where the accused was seated and that he presumed that the money and the chits were

handed to the accused. He however was forced to admit that when he was asked, on the spot, by the Inspector, with whom he had placed the bet he pointed out the accused. On a consideration of the whole of his evidence and of the evidence of Police Constable Thiagarajah, I am convinced that Gunapala has endeavoured to go back on the straight-forward and clear evidence which he gave on the first date and I am satisfied that the Magistrate was therefore not wrong in refusing to act upon the evidence given by Gunapala on the later date.

I am not unmindful of the dangers of acting on the evidence of a decoy. A long array of decisions of this Court lays down that it must be accepted with caution, and that it must be corroborated in material particulars by other testimony. While this Court is familiar with the infirmities attaching to the evidence of witnesses such as decoys, it is not unfamiliar with the spectacle of decoys turning round and contradicting the case for the prosecution. My Note-books furnish me with examples of excise cases—whether they are concerned with whisky or brandy, ganga or mere toddy—of decoys backing away from the prosecution. Three of these excisable articles figure in one single judgment of this Court in an excise case in appeal—*Dharmaratne vs. Kandasamy* (1933) 35 N. L. R. 206—because a Bench of two Judges had to consider the question whether a conviction can be sustained where the decoy's evidence tends to destroy the case for the prosecution, provided there is other evidence which sufficiently establishes, beyond reasonable doubt, that a sale took place. Poyser and Dalton, J.J., agreed that a conviction based on such other evidence is sustainable. I am in agreement with that view and would apply it in this case, with the caution that any other witness who is called to prove the transaction must be one who can speak to every detail of the illegal transaction and not make a bald statement that he saw the accused commit the particular act which constitutes the offence. I think that that test is satisfied in this case.

Gunapala was followed up the stairs by police constable Thiagarajah. Gunapala too has stated that the constable was following him about 5 feet behind. He further stated that there was no one between him and the constable. The constable's evidence makes it amply clear that it was this accused who received the two betting slips and the rupee note from Gunapala and that the accused " marked something on the chits " and put one of them into the drawer and the rupee note in the other drawer of the same table and that it was this accused who gave back to Gunapala one of the chits and the two coins of ten cents each. It is true that there is a conflict between the evidence of the constable and the evidence of Inspector Tharmarajah on the point as to whether Cyril Wijesinghe—one of the 13 persons found on the premises on the occasion of the raid—did or did not say that the sum of Rs. 925 belonged to him while the search party were on the premises. The constable was emphatic that Wijesinghe did not claim the money at the time and equally emphatic that Wijesinghe did not say that the money represented the proceeds of sale of copies of " The Trespasser ", a paper devoted to racing and other sporting news, sold at a retail price of only 15 cents each as appears from the copies produced in the case. There were quite a number of police officers present on the occasion and there must necessarily have been a fair amount of confusion occasioned by the raid. Furthermore there is nothing to show that Thiagarajah and the Inspector were together right through the raid. It may well be that Wijesinghe did not claim the money or say that it represented collections from sales of " The Trespasser " in the hearing of Thiagarajah. Were it necessary to do so, I would prefer to accept the evidence of police constable Thiagarajah whose recollections of the incident and events of that day which transpired under his direct observation are far more reliable than that of Inspector Tharmarajah. Mr. Pereira has commented very severely and with ample justification, on the evidence of the Inspector particularly in regard to the question as to who wrote the names of the three horses on the betting slips in question. I have not taken into the reckoning any evidence given by the Inspector. It was suggested, and again on the evidence of Gunapala given on the later occasion, that the betting slips given to Gunapala by the Inspector had the name of the horse Larnetown " or some town " as Gunapala stated in re-examination. Even giving full weight to the point that Gunapala gave this evidence in re-examination, I cannot accept the suggestion that the betting slips P1 and P1A were not the actual slips given to the decoy Gunapala in the presence of police constable Thiagarajah before they set out on their mission. Constable Thiagarajah's evidence is not subject to the infirmities attaching to the evidence of the decoy or the Inspector. The prosecution evidence therefore, in my view, establishes that the accused did receive the betting slips and negotiated the illegal bet in question.

It however remains me to consider the submission of law that the Judge has not scrutinized the defence but has virtually brushed it aside. An important piece of evidence relied on by the

defence is that of Mr. Masquita who says that he was on the premises on that date and that it was he who made the markings which appear on the betting slips P1 and P1A. Before seeing these slips in Court he placed on a blank piece of paper the markings which he said he made on the day in question on the relevant betting slips. These bear a remarkable resemblance to the markings on the betting slips P1 and P1A. It was therefore strongly contended that the evidence for the prosecution that the accused received the slips and had initialled or otherwise marked them is false and should be rejected. Mr. Masquita's story is a strange one. He said that he had marked the initials " K. C." and a running number on the chits as he was working for man called Wilbert who used to give him from 10 to 20 chits at a time and tell the witness what marks to put on them. He states however that he had no chits with him on the day in question and that he goes to this " Social Club " almost every day and that Wilbert comes there and gets him to make the markings on the chits. Nevertheless under cross-examination he stated that he did not know what those markings meant. But in re-examination he ventured the reply that the markings were put for the purpose of identifying the chits. It is not a very coherent or credible story and I share with the learned Magistrate his disbelief of the evidence of this witness. I agree that he was probably antecedently familiar with these markings and was able to reproduce them dramatically in Court. The Magistrate has rejected Masquita's evidence after considering the likeness between the writings made by Masquita in Court and those on the chits, although the language employed by him in doing so was unhappily chosen and so lent itself to comment.

It cannot be said that the learned Magistrate has not given consideration to the evidence led on behalf of the accused, or that he has proceeded to conviction without at all examining the defence, as was the view expressed by this Court in *S. C. 259/J. M. C. Colombo No.* 38819. Had I felt that the defence had been brushed aside or ignored I would have had no hesitation in setting aside the conviction, as happened in the case cited, because it would be a violation of the fundamental principle that every accused is not only entitled to have his case placed before the Court but also to have its merits examined and dealt with. The fact that it is rejected does not necessarily mean that it has not been considered That a Judge of the lower Court has not set out all the reasons that may be urged for rejecting a defence does not necessarily mean that he has not considered the defence. So long as the Appeal Court is satisfied that the defence has been examined and that its rejection has not been on grounds that cannot be justified, it cannot be said that the elementary principles of natural justice have not been observed. The fact that he refused an application that various writings on the betting slips and the specimen writings made in Court by the Inspector and Masquita be submitted to the Examiner of Questioned Documents or that the reason he gave for such refusal is open to criticism has not resulted in any miscarriage of justice in this case. In the result his finding was justifiable and his conviction of the accused should be maintained. I accordingly dismiss the application.

Application dismissed.

Present : Nagalingam, S.P.J. & Swan, J.

MUTTUKUMARU KASIPILLAI *et al* vs. SAMINATHA KURAKKAL

S. C. No. 51—*D. C. Jaffna No.* 5694

Argued on : 23rd May, 1952
Decided on : 30th June, 1952

Prescription—Plaintiff, officiating priest of Hindu Temple—Plaintiff's claim for declaration to office on prescriptive right and hereditary right—Roman Dutch Law—What rights can be acquired by prescription.

Plaintiff claimed that he was entitled to be declared the hereditary officiating priest of Nagapooshani Amman Temple on the ground (1) that he had acquired prescriptive title by reason of undisturbed and uninterrupted possession of a 2/9 share of the priestly office for over ten years, and (2) that he had a hereditary right.

Held : (1) That under our law acquisition by prescription is confined to rights in immovable property and there is no acquisitive prescription either to movables or choses in action or even to a right to an office.

(2) That the history and practice of the temple establish that the right to officiate as priests in the temple was hereditary and the plaintiff was therefore entitled to officiate as priest and receive "the traditional perquisites" of the office.

E. B. Wikramanayaka, Q.C., with *P. Navaratnarajah* and *C. Shanmuganayagam*, for the defendants-appellants.

H. W. Tambiah with *S. Sharvananda*, for the plaintiff-respondent.

NAGALINGAM, S.P.J.

This is an appeal by the defendants from a judgment of the District Court of Jaffna declaring the plaintiff a hereditary officiating priest of the Nagapooshani Amman Temple at Nainativu and awarding him damages against them. The plaintiff's case is based upon two grounds, firstly that he had been in the "undisturbed and uninterrupted possession" of a 2/9 share of the priestly office for a period of over ten years and had acquired a prescriptive right thereby, and secondly that from time immemorial according to custom and usage appertaining to this temple the office of an officiating priest is hereditary, the plaintiff claiming to be a descendant of one Ganesha Iyer Kumarasamy Iyer who he alleges was at one time the officiating priest. The defendants join issue with the plaintiffs on both grounds and contend that the plaintiff is neither entitled in law to set up any claim on the ground of prescription nor to do so on the ground of hereditary right.

The first point of dispute between the parties may be conveniently disposed of at once. The plaintiff's case is that he has been officiating for over ten years as a priest in this temple in respect of a 2/9th share and that as such he has acquired a title by prescription. He, however, does not claim to be entitled either to the fabrique of the temple or to the land on which it stands, or to any of the temporalities belonging thereto. Under our law, acquisition by prescription is confined to rights in immovable property. There is no acquisitive prescription in regard either to movable or to choses in action, or even to a right to an office. The plaintiff's claim, therefore, based upon prescription cannot be sustained.

The next question is whether the plaintiff has established a claim by custom and usage to a hereditary right. It is not disputed that Ganesha Iyer Kumarasamy and his son-in-law, Sankara Iyer Aiyacutty Iyer, were the officiating priests of the temple in 1856—*vide* P1 of 1856—and that since then their descendents have continued to perform functions as officiating priests in the temple. It is also the fact that among the descendents of Aiyacutty Iyer there have been cases *inter se* whereby the right to officiate as priests in this temple has been put on the basis of a hereditary right, and it is to be noted that in all those cases settlements were arrived at, and in some of the cases the present defendants and in others other trustees have taken part in bringing about settlements—*vide* decree P2 in D. C. 16442, P3 in D. C. 18424 and P4 in D. C. 1307 of the District Court of Jaffna. All these decrees have been entered on the footing of the existence of hereditary rights. What is more, in case D. C. Jaffna 14151, when application was made to Court to have this temple declared a public charitable trust and to have a scheme of management settled, the present defendants, who were appointed trustees of the temple in the said case, expressly formulated in their scheme of management provision to enable them to appoint officiating priests and to discontinue them, but neither the plaintiff in this case not the other officiating priests were made parties to the case, and on this fact being brought to the notice of the Court the Court did not embody this provision in the scheme but limited the right of the trustees to engage and dismiss all servants who may be employed in the administration of the trust, but the officiating priests were excluded—*vide* clause 15 of the scheme of management; and in clause 12 of the scheme of management, though the Treasurer was to be in charge of all accounts and to collect all the cash offerings and donations which appropriately belonged to the trust, he was expressly enjoined "not to interfere with the priests from receiving from worshippers their traditional perquisites for performing their priestly offices". These provisions in the scheme of settlement clearly recognise a right in the priest then officiating to officiate and receive the "traditional perquisites".

The present dispute has arisen as a result of the defendants refusing to permit the plaintiff to receive the "traditional perquisites", and to compel him to accept a salary in lieu thereof. The defendants' object may be very laudable in trying to secure as much of the income of the temple for the purpose of improving the fabrique of the temple, but this they can only do by at least getting a modification of the present scheme of management settled by Court at their own instance.

The judgment appealed from is therefore right and is affirmed with costs.

Appeal dismissed.

Present : GRATIAEN, J. & PULLE, J.

D. S. MUNASINHA vs. L. C. DE SILVA

S. C. No. 25—D. C. Avisawella No. 5825

Argued on : 11th July, 1952.
Decided on : 8th August, 1952.

Cause of action—Amendment of pleadings—Hire of elephant—Contract—Death of elephant due to negligence of defendant—Is it a tort?—Scope of action—Civil Procedure Code, Sections 40 (d) and 45.

The plaintiff, who sued the defendant for damages in connection with the hire of an elephant stated in his plaint that the contract was entered into within the jurisdiction of the Court, and after referring to the date and nature of the contract claimed damages on the ground that the elephant died owing to the negligence of the defendant. He sought to amend the plaint in order to make it clear that his claim was based on contract. The learned District Judge disallowed the amendment on the ground that the plaintiff was seeking to alter the scope of his original action which was based on a tort to one based on a contract. The plaintiff appealed.

Held : That the original plaint was based on contract and the mere mention of negligence in the plaint did not convert it into one of tort and as such the amendment should have been allowed.

N. E. Weerasooria, Q.C., with *C. V. Ranawake* and *W. Wimalachandra*, for the plaintiff-appellant.

N. M. de Silva, with *Lyn Weerasekera*, for the defendant-respondent.

PULLE, J.

The plaintiff who is the appellant sought to amend his plaint to make it clear that the sum of money which he claimed as damages in connection with the hire of an elephant to the defendant became due in consequence of a breach of contract on the part of the defendant. The learned Judge disallowed the amendment on the ground that the plaintiff was seeking to alter the scope of an action based originally on a tort to one based on a contract. In my opinion the appeal is entitled to succeed.

Section 40 (*d*) of the Code requires that a plaint shall contain a plain and concise statement of the circumstances constituting each cause of action and where and when it arose. Section 45 lays down that every plaint shall contain a statement of facts setting out the jurisdiction of the Court to try and determine the claim in respect of which the action is brought. The first paragraph of the plaint is clear that the action is based on a contract for it reads,

> "The contract hereinafter referred to was entered into at Kosgama within the local limits of the jurisdiction of this Court". No other jurisdiction is pleaded. The second paragraph refers to the date of the contract and its nature, namely, the hiring of an elephant and its keeper. The third paragraph specially pleaded that the elephant and its keeper were to be under the control and directions of the defendant. The next paragraph which has been seized upon as imparting to the facts pleaded the quality of an action in tort reads:
>
> "The plaintiff states that while the said elephant and its keeper were so engaged the defendant compelled the elephant to work at a time when it was ill and unable to work and by his *negligence* caused the death of the animal".

Now it is illogical to argue that because negligence arising independently of a contract is a tort the reference to negligence in the paragraph quoted above converts the action embodied in the plaint into one founded on a tort. When all the paragraphs in the plaint are read together it is reasonably plain that the claim for damages is based on the breach of an expressed or implied term in the contract of hire. That a duty to take care may be a term of a contract is a proposition which cannot be contested. That a breach thereof is a breach of contract and is not exclusively a tort is equally incontestable. In my opinion the question of amending the plaint might not have arisen had issues 4 and 5 formulated on behalf of the plaintiff on the trial date been made to appear clearly to rest on the foundation of a contract.

The order appealed from is set aside. The case will go to trial on all issues of fact pleaded in the plaint on the basis of a contract and, if necessary, on any additional facts pleaded in the amendments. There will be no costs of appeal. The plaintiff will pay the defendant the costs of 7th March, 1951, but all other costs will be costs in the cause.

GRATIAEN, J.
I agree.

Set aside and sent back.

Present : GRATIAEN, J. & PULLE, J.

SOPIN NONA PATHMASILLIE vs. R. DON JORLIS RAJAPAKSA

S. C. No. 77—D. C. Gampaha No. 176/15110 (N)

Argued on : 16th July, 1952.
Decided on : 8th August 1952.

Civil Procedure—Certificate of payment—Proctor's right to certify on behalf of Decree-Holder,—Sections 349, 24 *Civil Procedure Code.*

Held : That certification of payment under section 349 of the Civil Procedure Code does not involve an appearance in Court on the part of the decree-holder, and the proviso to section 24 of the Civil Procedure Code does not apply. The written consent of the decree-holder is not necessary where a proctor representing him moves the Court to certify payment.

K. Herat, with *H. Rodrigo*, for the plaintiff-appellant.
No appearnace for the defendant-respondent.

PULLE, J.

The appellant in this case is the plaintiff who had obtained a decree for judicial separation, alimony and costs against the defendant. The question which gives rise to this appeal does not involve a contest between the plaintiff and the defendant. It is rather in the nature of a contest between the plaintiff's Proctor and the learned Judge.

The plaintiff's Proctor moved on the 12th July, 1951, to certify payment of Rs. 900 paid on behalf of the defendant as alimony for eighteen months. The order made on the motion was that the written consent of the plaintiff herself be filed. On the 12th November, 1951, the Proctor moved that the order be vacated on the ground that the consent of his client was not necessary. The application might have been allowed at least on the narrow ground that a uniform practice in any Court is conducive to the expeditious disposal of legal business ; for the journal entries numbered (31) and (32) in this very case show that two subsequent payments of alimony, namely, for August and September, 1951 were separately certified at the instance of the same Proctor without special authorization by the plaintiff.

Giving the reasons for refusing to vacate his order the learned Judge states that section 349 of the Civil Procedure Code " is not quite clear as to whether certification of payment could only be made by the decree-holder ". If the lack of clarity can be said to arise because the words of the section are " he shall certify such payment " and not " he or his Proctor shall certify such payment ", then the same gloom would descend on innumerable sections of the Code where no one doubts that reference to any party doing an act in a legal proceeding includes a reference to that party's Proctor.

The learned Judge, however, concedes that the first part of section 24 of the Code " would seem to authorise " a Proctor to certify payment, but that there is a discretion vested in him under the proviso covered by the words " Provided that any such appearance shall be made by the party in person, if the Court so directs ", to direct that the consent of the plaintiff be filed, and he made order accordingly. The present appeal is from that order.

Even if the proviso does apply I fail to appreciate how the filing by the Proctor of a written consent by his client is equivalent to the " appearance " of the client " *in person* ". In my opinion certification of payment under section 349 does not involve an appearance and there is, therefore, no scope for the application of the proviso to section 24. Section 24 itself in the opening words " any appearance, application or act in or to any Court " puts the matter beyond doubt.

I would, therefore, set aside the order appealed from and direct that the motion under date 12th July, 1951, be allowed unconditionally. There will be no costs.

GRATIAEN, J.
I agree.

Set aside.

Present : NAGALINGAM A.C.J., GUNASEKARA J. & CHOKSY, A.J.

GIRIGORIS PERERA vs. ROSALINE PERERA

S. C. 99—D. C. Colombo, 3640

Argued on : 24th March, 1952
Decided on : 28th May, 1952

Deed—Rectification of—Transfer of undivided shares of whole land—Parties intention to deal with divided interests of specific portion of whole land—Mistake—Courts power to give relief—Equitable principles—Evidence Ordinance, section 92, proviso (1).

Held : By GUNASEKARA J. and CHOKSY A.J. (NAGALINGAM A.C.J. dissenting). Where deeds conveyed undivided shares of the whole land, when in fact the parties to the deed intended to deal with shares of a divided portion of that land, resulting in a misdescription of the property that was dealt with, the Court guided by principles of justice, equity, and good conscience, has the power to rectify the mutual mistake of the parties and give effect to their real intention.

(2) That the Court has power to grant this relief even though the plea of mistake and a claim for rectification had not been set up in the suit.

(3) That the case of Jayaratne vs. Ranapura (1951) 52 N.L.R. 499 was correctly decided.

Disapproved : *Dona Elisahamy vs. Don Julis Appuhamy* (1950) 52 N. L. R. 332.

Authorities referred to : *Simpson vs. Foxon* (1907) Probate 54.
Shore vs. William (1842) 9 Cl. & Find. 355.
Skelton vs. Younghouse (1942) A. C. 571.
R. vs. City of London Court Judge (1892) 1 Q. B. 273.
London and Indian Docks Co. vs. Thames Steam Tug and Lighterage Co. (1909) A.C. 15
Abel vs. Lee (1871) L. R. C. P. 365.
Fernando vs. Christina (1912) 15 N. L. R. 321.
Bernard vs. Fernando (1913) 16 N. L. R. 438.
Fernando vs. Podi Sinno (1925) 6 C. L. Rec. 73.
Perera vs. Tenna (1931) 32 N. L. R. 228.
Mudalihamy vs. Appuhamy (1934) 36 N. L. R. 33.
Don Andris vs. Sadinahamy (1919) 6. C. W. R. 64.
Fernando vs. Fernando II (1921) 23 N. L. R. 483.
Woodroffe and Ameer Ali's Law of Evidence (9th Ed.) p. 663.
Mohendra vs. Jogendra (1897) 2 C. W. N. 260.
Rangasami vs. Souri (1916) 39 Mad. 792.
Fernando vs. Fernando I (1921) 23 N. L. R. 266.
Dagadu vs. Bhana (1904) 28 Bomb. L. R. 420.
Mensi Nona vs. Neimalhamy (1927) 10 C. L. Rec. 159.
Lucyhamy vs. Perera (1938) 40 N. L. R. 232.
Goonesekere vs. Van Rooyen (1926) 7 C. L. Rec. 88.

Austin Jayasuriya, for the 9th defendant-appellant.

N. E. Weerasooria, Q.C., with *E. S. Amarasinghe* and *W. D. Thamotheram*, for the 8th defendant-respondent.

Cur. adv. vult.

May 28, 1952. NAGALINGAM, A.C.J.

This case has been referred to a Divisional Bench in view of the divergent views expressed in the cases of *Dona Elisahamy vs. Don Julis Appuhamy* (1950) 52 N. L. R. 332 and *Jayaratne vs. Ranapura* (1951) 52 N. L. R. 499 as to the effect of deeds conveying undivided interests in larger lands where the vendors are in fact entitled to divided interests in smaller allotmnets thereof.

This is a partition action, and the point arises for determination in view of the conflicting claims made by the 8th and 9th defendants; they are the children of one Kirinelis who admittedly was entitled to a half share of the land called Gorakagahawatte depicted in Plan P1 filed of record. This lot was part of a larger allotment bearing the same name, and at an amicable division effected in 1914 among the co-owners of the larger allotment was allotted to Kirinelis and another co-owner in lieu of their undivided interests. Notwithstanding the division, Kirinelis by deed 8D1 of 1914 gifted to the 8th and 9th defendants an undivided one-tenth share of the entirety of the land, which was the correct fractional share to which he was entitled in the entire land, while, as stated earlier, under the division he became entitled to a half share of the lot in dispute. In 1937, by deed 8D3, the 9th defendant conveyed " an undivided one-half of an undivided one-tenth share " of the entire land, but it should be noted that the 9th defendant was not in

possession of any undivided interests in the larger land and that his possession was confined to the divided lot. The 8th defendant claims that the deed was operative to convey to her a half of a half share of the divided lot, which would represent the entirety of the interests of the 9th defendant in the land sought to be partitioned; whereas the 9th defendant contends that the deed is effectual to convey only a one-twentieth share of the land in dispute, though the description of the parcel conveyed by him may relate to the bigger land.

The question is what is the interest that the deed in fact conveys. This depends upon a simple construction of the deed, and one has only to look to its terms to ascertain what it conveys without letting oneself be influenced by any extraneous considerations such as those allowable in the case of a will. Here, the parcel that is conveyed is "an undivided one-half of an undivided one-tenth share" of the land called Gorakagahawatte, which is described by metes and bounds and which is said to contain an extent of land sufficient to plant eight hundred coconut trees, that is, an extent of about eight acres. Can there be any doubt that the conveyance is of an undivided one-twentieth share in the larger land? The description of the interest conveyed is, in the language of Pereira, J., "a perfectly intelligible description", and it is the only description of the land in the deed on which the 8th defendant bases her title. But what the 8th defendant desires the Court to do is to read it quite differently and to substitute another description which would run as follows for what is contained therein: "an undivided one-half of an undivided one-half share of the divided part of Gorakagahawatte within the metes and bounds detailed in plan P1 and of the extent of about one and a half acres". It would be manifest that such a substitution of the description of the parcel conveyed will be totally illegitimate and unsupported by any known canon underlying the interpretation of documents.

As observed in the case of *Simpson vs. Foxon* (1907) Probate 54, "What a man intends and the expression of his intention are two different things. He is bound and those who take after him are bound by his *expressed intention*". Construing the deed, which in its terms are clear, unambiguous and precise, the only conclusion one can come to is that the deed conveyed to the 8th defendant a 1/20 share of the larger land, and if the vendor had no title to the entirety of the larger land, but title only to a smaller portion of it, the deed can only convey to the vendee the same fractional share in the smaller lot, and the deed must be held to be operative only to the extent of a 1/20th share in the lot now in dispute.

It is, however, said that while this would be the correct result on a strict construction of the deed, nevertheless the Court should give effect to the intention of the parties. But "it is not the function of the Court to ascertain the intention otherwise than from the words used in the deed". See *Shore vs. William* (1842) 9 Cl. & Find. 355 and *Skelton vs. Younghouse* (1942) A. C. 571. And the intention which is being given effect to must be ascertained in accordance with established principles—*R. vs. City of London Court Judge* (1892)1 Q. B. 273 and *London and Indian Docks Co. vs. Thames Steam Tug and Lighterage Co.* (1909) A. C. 15. Besides, the Court's powers "do not extend to making such alterations as are necessary to bring the document in accord with the Judge's idea of what is right or reasonable"—*Abel vs. Lee* (1871) L. R. C. P. 365. I do not understand the use of the term "strict interpretation" where a deed employs language not obscure but perfectly plain and the construction placed thereon is in accordance with its plain meaning. In such a case you give neither a strict nor a broad construction. You interpret it simply according to the plain language that has been used, and then it is neither a strict nor a broad interpretation of the words but the one and only interpretation of them. The contention that the intention of the parties as gathered from facts and circumstances *de hors* the language of the deed should prevail is a very slender argument to lean upon, for no authority can be found that in the absence of ambiguity in the deed evidence could be received of the existence of facts and circumstances tending to contradict or modify the terms of the deed. That the intention must be gathered from the words used is a well defined high road along which generations of Judges have travelled, guided by signposts of numerous cases, to reach the destination of the real intention of parties to an unambiguous document that any deviation thereupon would lead the lone traveller along by-paths into a morass of speculative intentions wherein he would get bogged without any hope of extricating himself therefrom.

I shall now pass on to a consideration of the various authorities cited and shall first deal with the cases which illustrate the principle that a deed should be construed according to its plain meaning unfettered by extraneous considerations.

The first case is that of *Fernando vs. Christina* (1912) 15 N. L. R. 321 where Pereira, J., was invited as in the present case to construe a conveyance of an "undivided four-sixths of one-third share of the defined southern portion of Mawatabadawatta" as conveying the entirety of the divided portion of the land which the vendor

had possessed in lieu of his undivided interests. The learned Judge refused to accede to the request and held, " Whatever the parties may have intended to convey, the property in fact conveyed was an undivided four-sixths of one-third of that portion ", that is, of the divided lot.

The next case to the same effect is that of *Bernard vs. Fernando* (1913) 16 N. L. R. 438 where too the vendor who was entitled to two divided lots A and D in lieu of his undivided interests in a larger land conveyed a one-fifth share of the larger land, and where it was contended that the deed must be construed as conveying to the vendee the entirety of the lots A and D. Pereira J., with whom de Sampayo J. was associated, in delivering judgment said in emphatic terms :—

> " *It is, of course, obvious* that, having purchased an undivided share in the entirety, they cannot establish title to the divided lots A and D."

A similar view was taken in *Fernando vs. Podi Sinno* (1925) 6 C. L. Rec. 73. In this case the Court was called upon to construe a deed conveying undivided shares in a bigger extent of land as in fact conveying divided lots to which the vendors were entitled. Bertram C.J., with whom Jayawardene J. was associated, repelled the contention and expressed himself thus :

> " If persons who are entitled by prescription of a land persist after they have acquired that title, in conveying an undivided share of the whole land of which what they have possessed is a part ; and if the persons so deriving title pass on the same title to others, then the persons claiming under that title, unless they can show that they themselves acquired a title by prescription must be bound by the terms of their deeds."

Dalton and Akbar JJ. arrived at a like conclusion in respect of this question in *Perera vs. Tenna* (1931) 32 N. L. R. 228. The facts here were that the vendors conveyed an undivided half share of the entire land when in point of fact they were entitled to two divided lots D and D1. The Judges rejected the argument that the deed must be construed as operating to convey the divided lots D and D1.

The next case is that of *Mudalihamy vs. Appuhamy* (1934) 36 N. L. R. 33 where Maartensz A.J. used language which is self-explanatory of the facts. The learned Judge said :—

> " Having purchased an individed 2/3 share of the whole land, when the execution debtor was entitled to lot A3 he is only entitled to an equivalent share, namely, 2/3 of A3."

Dalton J. expressed the same view when he said that the plaintiff " himself purchased only an undivided 2/3 share in the entirety, he is entitled as a result to an undivided 2/3 share only in the share in severalty ".

All the cases hitherto considered are cases instituted for declaration of title. The last case in this series is one under the Partition Ordinance, and that is the case of *Dona Elisahamy vs. Don Julis Appuhamy* (supra). That was a case decided by Pulle J. and me. There, to take one of the deeds dealt with, the conveyance was of a 1/7 of ¼ of 1/12 of a land of 24 acres. The vendees claimed a 1/7 of a ¼ of a divided allotment in extent 2 acres, to which divided allotment the vendor's predecessor-in-title had acquired title by prescription. The conveyance was held to be effective to convey 1/7 of ¼ of 1/12 of the divided extent of two acres and no more.

It will thus be seen there is a long series of cases in which the view was taken that a deed must be construed according to the ordinary connotation of the language used in it and the intention ascertained from the words employed by the parties.

Now I shall proceed to consider the cases that are said to take a contrary view.

The first of these cases is that of *Don Andris vs. Sadinahamy* (1819) 6 C. W. R. 64 decided by de Sampayo J. and Schneider J. The facts in this case are the converse of what have been considered in the previous cases. Here the vendor, who was entitled to an undivided share in the land, purported to convey not his undivided interests nor even lots allotted to him under a scheme of partition but *koratuwas* or portions which he had possessed for purposes of cultivation. It is to be stressed that there was no contest between the parties as to the proportions in which they were entitled to the land as the defendants admitted the shares claimed by the plaintiff and accepted the shares allotted to them. The trial Judge on a perusal of the deeds held that as the deed of conveyance in favour of the plaintiff was for specific portions an action for partition did not lie, and from that judgment the case came up in appeal. The Court in these circumstances felt it could very well decree partition on the basis of the admitted claims of the parties. No legal principles were discussed, for such a course was rendered unnecessary in view of the agreement of parties as to their respective shares, but it is true that de Sampayo J. declared in that case :—

> " But if the real intention is to dispose of the interests of the persons in the entire land, this Court has found no difficulty in giving a broad construction to such deeds and to deal with the rights of the parties on the original footing."

It is to be observed that counsel has not been able to cite any other case on similar facts decided prior or subsequent to it.

The next case is that of *Fernando vs. Fernando* (1921) 23 N. L. R. 483 which came up before a Bench consisting of Betram C.J. and de Sampayo J. This was also a case under the Partition Ordinance. Plaintiff claimed a $\frac{3}{4}$ share and allotted to the defendant a $\frac{1}{4}$ share but the deed of the plaintiff gave him a $\frac{3}{8}$ of the larger land of which the *corpus* sought to be partitioned was about half. It was contended on behalf of the defendant that as the plaintiff's deed gave him a $\frac{3}{8}$ of the whole, he could not have more than a $\frac{3}{8}$ of any particular portion of the whole. Bertram C.J., who delivered the judgment of the Court, took care to say in reference to this argument, not that it was not good in law but that—

> "the question here is not *what is the precise share stated in the deeds of the plaintiff*, but in what proportion, as between the plaintiff and the defendant, is the land to be divided."

It will be apparent, therefore, that the learned Chief Justice accepted the contention in regard to the construction of the deed as sound but proceeded to decide the case upon other grounds. In fact, that the learned Chief Justice understood this judgment in this sense is abundantly clear from his observations in the later case of *Fernando vs. Podi Sinno* (supra).

Although I have already compendiously stated the point decided in that case, it is necessary to advert to it a little more fully, to appreciate what was laid down in *Fernando vs. Fernando* (supra). Depending upon the observation of de Sampayo J. in *Don Andris vs. Sadinahamy* (supra) already quoted, the Court was invited to lay down the converse of that principle. The learned Chief Justice in reference to this argument said :

> "That principle was, however, enunciated in a partition action, where it could be conveniently applied. But I do not feel able to enunciate the converse of that principle in an action *rei vindicatio*."

He went on to say, and this is what is important :

> "There are other cases in a contrary direction, see *Fernando vs. Frenando* and the cases there cited."

Now, if *Fernando vs. Fernando*, which was an action for partition, decided that a deed conveying an undivided share in the larger allotment should be construed as conveying the divided interests of the vendor, the case cannot be said to have been decided in a contrary direction to that of *Don Andris vs. Sadinahamy* (supra) ; so that it is clear that even in a partition action, such as *Fernando vs. Fernando* (supra) in reality was, the learned Chief Justice considered that the view he had taken in respect of the construction of the deed had been in a sense contrary to that laid down in *Don Andris vs. Sadinahamy* (supra) and that he had adjudicated upon the rights of parties in that case on other grounds. This case, therefore, cannot be regarded as an authority for the proposition that in a partition case it is permissible to transmute the shares conveying undivided interests in a larger land into larger shares, fractional or otherwise, of divided portions of it. It is to be emphasised that Bertram C.J., himself never attempted the discovery of the intention of the parties for the purpose of construing the deed by reference to circumstances outside the language used in the deed.

We now come to the last case, decided by Gratiaen J. and Gunasekara J., namely, that of *Jayaratne vs. Ranapura* (supra). In this case the plaintiff claimed a 1/6 share of the *corpus* which was a defined portion of a larger land by virtue of a deed which conveyed to him an undivided 1/36 share in the entirety. Gratiaen J. in delivering the judgment of the Court, after making the observation that :

> "The amicable partition to which I have referred had already taken place, but this circumstance does not seem to have been brought to the notice of the notary who drafted the conveyance. The interests of Babanis and Charles ultimately passed, by a series of deeds in which various successive purchasers were concerned, to the plaintiff by the deed P 10 of 1947. The evidence establishes very clearly that each such purchaser in turn possessed, by virtue of his title, the outstanding 1/6 share of the *corpus* and made no claim to possess any interests in the other allotments comprising the larger land. Unfortunately, however, as so often happens in loose notarial practice, the shares which Babanis and Charles and their successors-in-title purported to deal with in their respective deeds were described on each occasion *with reference to the undivided 1/36 of the larger land* and not, as they were intended to do, the undivided 1/6 share in the smaller *corpus*. The same error was perpetuated in the deed P 10 executed in favour of the plaintiff"

and purporting to follow what was believed to have been decided in *Fernando vs. Fernando* (supra) held that the *plaintiff's deed should be given effect to as if it conveyed a 1/6 share in the divided allotment.*

I have said enough already to indicate that it is not permissible to draw an inference as to the intention of the parties by reference to

extraneous circumstances, such as that the Notary does not appear to have been apprised of the amicable partition which had taken place prior to his attestation of the deed or that the successive vendees possessed a 1/6 share in the defined allotment or that there was an error in the execution of the deed. Gratiaen J. also further stated :—

> " I must confess that, if the question was at large, I might find some difficulty in justifying a departure from the strict rules laid down for construing written instruments."

This case must therefore be regarded as having been wrongly decided and must be overruled.

An undercurrent of thought appeared to prevail during the argument that in construing a deed which comes up for construction in a partition action different principles from those applicable to a deed in an action *rei vindicatio* could be applied. I do not think any such distinction can be drawn, for a partition action is in reality a large number of actions *rei vindicatio* rolled together, not merely among the parties *inter se* but as against the whole world, coupled with a prayer for relief of a special kind. The principles of construction in both cases are therefore identical.

Before concluding this judgment I should wish to make one or two observations in regard to certain ancillary matters.

In the first place, Proviso (1) to section 92 deals with the reception of evidence on the ground *inter alia* of mistake but not in regard to ambiguity in a deed. I need not say that ambiguity is far removed from mistake. Ambiguity is something which is inherent in the language used in the document leading to an uncertainty as to what was intended by it. A mistake, on the other hand, deals with an entirely different problem. It proceeds on the basis that the document as constituted is perfectly clear and plain but that it does not reflect truly the intent of the parties to the document.

In the second place, at the argument learned Counsel for the respondent did not attempt to support the judgment on the ground of either ambiguity or mistake in the deed 8D3, and this for good reasons. The deed is precise and clear, presenting no difficulties of construction, and the meaning is quite plain. Mistake in the execution of the deed was not put forward, for neither in the pleadings nor when the points in dispute came to be formulated was any suggestion made that the deed contained an error. The 8th defendant claimed that a 1/4 share had been transferred on deed 8D3. The 9th defendant denied the execution of the deed, and there the matter rested so far as the evidence of the parties was concerned. The 8th defendant did not give evidence of any mistake.

In these circumstances it is difficult to see how, without even the 9th defendant being given an opportunity of meeting a plea of mistake, the rights to which he would be entitled to after giving full effect to the deed of conveyance could be denied to him.

The case of *Fernando vs. Fernando* (1921) 23 N. L. R. 266 is clearly distinguishable. There, though no plea of mistake was set up, the defendant set up estoppel instead, an estoppel based on facts which in law did not satisfy the requirements of such a plea, but he relied upon circumstances which encompassed within them facts from which the existence of mistake could have been inferred, and the plaintiff was thereby given an opportunity of presenting his case in relation to the facts which constituted the ground of mistake, and it is worthy of note that Bertram C.J. said :

> " Strictly speaking, the defendant should have asked for this relief in his answer and by reconvention."

I do not therefore think in the present circumstances it is within the power of the Court, without any proper material before it, and without an opportunity being given to the 9th defendant to take upon itself the duty of pronouncing upon the existence of a non-alleged mistake in the deed.

Finally, I wish to observe that it cannot be said that the case of *Jayaratne vs. Ranapura* (supra) was decided on any other ground than that of the interpretation of the relevent deed, for if it was, there would have been no conflict between that case and that of *Dona Elisahamy vs. Don Julis Appuhamy* (supra), and the necessity for referring this case to a Divisional Bench would not have arisen.

In view of the foregoing, I would hold that deed 8D3 is operative to convey only a 1/20 share of the land in dispute and that the 9th defendant is entitled to the balance of his interests. The decree would be amended on this basis.

The 8th defendant will pay to the 9th defendant the costs of appeal and of the contest in the Court below.

GUNASEKARA J.

I have had the advantage of reading the draft of the Acting Chief Justice's judgment and, if I may say so with respect, I agree with what he has said regarding the interpretation of deeds. It seems to me, however, that, rightly understood, the controversy with which we are concerned

relates not to the construction of a deed but to the nature and extent of the Court's power to give relief against mistake when it appears that as a result of mutual mistake the parties have expressed in the deed an intention different from their actual intention.

As for the admissibility of evidence of such mistake it would mot be correct, I think, to state as a general proposition without qualification that "no authority can be found that in the absence of ambiguity in the deed evidence could be received of the existence of facts and circumstances tending to contradict or modify the terms of the deed". In terms of the first proviso to section 92 of the Evidence Ordinance, any fact, such as mistake, may be proved which would entitle any person to any decree or order relating to the deed. The Ordinance itself gives the following illustration section 92, Illustration (*e*) :—

> A institutes a suit against B for the specific performance of a contract, and also prays that the contract may be reformed as to one of its provisions, on the ground that that provision was inserted in it by mistake. A may prove that such a mistake was made as would by law entitle him to have the contract reformed.

Under the corresponding provision in the Indian Evidence Act it has been held that in an action for the recovery of land included in an estate conveyed to the plaintiffs by the defendant oral evidence is admissible to prove that the property in question was included in the conveyance as a result of a mutual mistake of the parties; and that in such a case a Court administering equity will interfere to have the deed rectified so that the real intention of the parties may be carried into effect and will not drive the defendant to a separate suit to rectify the instrument. *Woodroffe* and *Ameer Ali's Law of Evidence (9th edition) p. 663,* citing *Mohendra vs. Jogendra* (1897) 2 C. W. N. 260. (The report of this case is not available to me.) See also *Rangasami vs. Souri* (1916) 39 Mad. 792.

A similar view, both as to the effect of the first proviso to section 92 of the Evidence Ordinance and as to the powers of a Court to grant relief against mistake, was taken by this Court in the case of *Fernando vs. Fernando I,* (1921) 23 N. L. R. 266 decided by Bertram C.J. and Garvin J. The plaintiff in that case had purchased land which was at that time subject to a lease from his vendors to the defendant. The parties to the lease had intended that it should apply to the whole of the property, but by a mistake in the drafting of the deed the subject of the lease was described as comprising only the southern portion. The plaintiff himself, at the time of his purchase, thought that he was buying the property subject to a lease of its entirety. When he discovered the mistake in the deed of lease, however, he sued the defendant for recovery of the half that was not included in the description of the property leased. The defendant pleaded estoppel. It was held that this plea was misconceived and that "What the defendant ought to have pleaded was that the lease was drawn up in its present form through a mutual mistake of the parties thereto, and a claim in reconvention ought to have been made that the lease should be rectified so as to represent the true intent and meaning of the parties; and he should further have pleaded that the plaintiff knew the true extent of the land leased, and was bound by the same equity as his vendors." The Court held that it had power to grant the defendant relief upon this footing though he had not asked for it, and dismissed the plaintiff's action. In his judgment in that case Bertram C.J. cited with approval the case of *Rangasami vs. Souri* (supra) and another Indian case, *Dagdu vs. Bhana* (1904) 28 Bom. L. R. 420 in which Jenkins C. J. said :—

> "It is true that rectification is not claimed in this suit as a relief by the defendants..... but as a Court guided by the principles of justice, equity, and good conscience, we can give effect as a plea to these facts, which in a suit brought for that purpose would entitle a plaintiff to rectification."

The case of *Jayaratne vs. Ranapura* (1951) 52 N. L. R. 499 was concerned with an instance of a common form of mutual mistake resulting in misdescription of the property dealt with in a deed, where the parties erroneously describe interests in an allotment of land as a fractional share of a larger estate of which that allotment at one time formed a part. The action was one for the partition of an allotment which was one of six lots into which a larger property held in common in equal shares by six groups of persons had been informally partitioned by the co-owners, each group of whom thereafter possessed one of the lots exclusively in lieu of their undivided one-sixth share, abandoning their interests in the other lots. The allotment that was the subject of the action had been possessed in this manner by the successors in title to one Cornelis, who had been the owner of a one-sixth share of the larger property, and this group had in due course acquired title to it by prescription. In 1947 the defendant became entitled to a 5/6 share of this allotment, representing 5/36ths of the larger property which had passed from Cornelis to his daughters. The remaining 1/36 Cornelis had transferred in 1908 to two persons

named Babanis and Charles. The interests of these two persons passed through successive purchasers ultimately to the plaintiff (who acquired them in 1947 by the deed P10), and each purchaser had in turn possessed the outstanding 1/6 share of the allotment in question and had made no claim to possess any interests in the other allotments. "Unfortunately, however, as so often happens in loose notarial practice, the shares which Babanis and Charles and their successors in title purported to deal with in their respective deeds were described on each occasion *with reference to the undivided* 1/36 *of the larger land* and not, as they were intended to do, the undivided 1/6 share in the smaller *corpus*. The same error was perpetuated in the deed P10 executed in favour of the plaintiff." Upon this chain of deeds the plaintiff successfully claimed before the District Judge an undivided 1/6 share of the allotment that was the subject of the action. In appeal the defendant's counsel conceded that "these notarial instruments were intended to convey the 1/6 share in the *corpus* which the plaintiff and his predecessors in title had successively possessed by virtue of these deeds", but he submitted that it was "not open to a Court to give effect to this intention unless and until the manifest error is corrected by a notarially executed deed of rectification".

The appeal was dismissed upon the authority of the decision of Bertram C.J. and de Sampayo J. in *Fernando vs. Fernando II*; (1921) 23 N. L. R. 483 but an answer to this argument of Counsel is also provided by the decision in *Fernando vs. Fernando I*, (1921) 23 N. L. R. 266 which too is cited in the judgment of Gratiaen J. and which is authority for the view that where the facts entitle a party to rectification of a deed a Court administering equity has power to grant him relief upon that footing even though it has not been claimed in the suit.

The case of *Fernando vs. Fernando II* (1921) 23 N. L. R. 483 cannot be distinguished from *Jayaratne vs. Ranapura* (1951) 52 N. L. R. 499 on the facts. That too was an action for the partition of an allotment of land that had at one time formed a part of a larger property. It had been possessed exclusively by a co-owner of the larger property in lieu of an undivided half share to which he was entitled, and he had acquired a title to it by prescription. His interests ultimately devolved on the plaintiff and the defendant. The question for decision was whether the plaintiff, whose claim was based on a deed that purported to convey to him a $\frac{3}{8}$ share of the larger property, was entitled to a $\frac{3}{4}$ share of the allotment in question or only to a $\frac{3}{8}$ share of it, and it was held that he was entitled to a $\frac{3}{4}$ share. The cases of *Fernando vs. Christina*(1912) 15 N. L. R. 321 and *Bernard vs. Fernando* (1913) 16 N. L. R. 438 were cited in support of the contrary view, and Bertram C.J. said :—

> "If I understand these cases aright, the principle which they lay down is that a purchaser who acquires an undivided share of a land is only entitled to the same undivided share of any specific portion of the land when the partition of that portion is under consideration. But that is so where other undivided interests come into consideration. Where, however, two parties have acquired the whole interest of a shareholder in certain proportions, and their deeds describe the interest of such a shareholder as an undivided interest, and it transpires that a specific portion of the land has, in fact, been held by the person through whom they both claim as his portion for the prescriptive period, and the question then arises as to the proportion in which that specific portion has to be divided, it seems to me that justice requires that, as between those parties, this specific portion must be divided in the same proportions as those described in their deeds."

I respectfully agree with my Lord the Acting Chief Justice's view that Bertram C.J. "accepted the contention in regard to the construction of the deed as sound but proceeded to decide the case upon other grounds". These other grounds were that it had transpired, from evidence outside the deeds, that the common predecessor in title of the plaintiff and the defendant, whose entire interests had been acquired by them in certain proportions, had prescribed to a specific portion of the larger property holding it in lieu of an undivided half share, and the question that then arose was "not what is the precise share stated in the deeds of the plaintiff, but in what proportion, as between the plaintiff and the defendant, is the land to be divided". In these circumstances it was held that *justice required* that the specific portion that represented the common predecessor's half share must be divided between the plaintiff and the defendant in the same proportions as those described in their deeds. The result of deciding the case not in accordance with the intention mistakenly expressed in the deeds but upon other grounds, and in accordance with what justice required notwithstanding the terms of the deeds, was to give effect to the real intention of the parties to the deeds, ascertained from an examination of circumstances outside the instruments themselves. It seems to me that the true explanation of the judgments in this case and the case of *Don Andris vs. Sadinahamy* (1919) 6 C. W. R. 14

is that suggested by Gratiaen J. in *Jayaratne vs. Ranapura* (1951) 52 N. L. R. 499 when he said (citing the case of *Fernando vs. Fernando I*) (1921) 23 N. L. R. 266 that " the correct solution may lie in the jurisdiction of a Court to rectify, or treat as rectified, documents in which, by a mutual mistake the true intention of the parties is not expressed ". It is that jurisdiction that enables a Court of law, which is also a Court of equity, to make in such cases an order that is in accordance with what " justice requires ".

Don Andris vs. Sadinahamy (supra), which too was an action for partition of land, provides an instance of the converse of the case of *Fernando vs. Fernando II* (1921) 23 N. L. R. 483. The parties to the deeds that were considered in that case had purported to deal with separate allotments into which the *corpus* that was the subject of the action had been divided, though their actual intention (ascertained again from evidence outside the instruments themselves) was to deal with corresponding undivided shares in the entire *corpus*. De Sampayo J., with whom Schneider J. agreed, said :—

> " It is not uncommon for co-owners to dispose of their interests by reference to particular portions or *koratuwas* of which they have had possession. But if the real intention is to dispose of the interests of the persons in the entire land, this Court has found no difficulty in giving a broad construction to such deeds, and to deal with the rights of the parties on the original footing."

The " broad construction " that is referred to can only be a process that involves rectification and not merely interpretation of the documents, and therefore an exercise of the Court's jurisdiction in equity to which Gratiaen J. refers.

Whether relief can be granted on this footing in the case of a misdescription of the kind with which we are here concerned must of course depend on the circumstances in which the question arises. Hence it was that in the case of *Fernando vs. Podi Sinno* (1925) 6 C. W. R. 73 Bertram C.J., quoting the above passage from de Sampayo J.'s judgment in *Don Andris vs Sadinahamy*, (1919) 6 C. W. R. 14 said :—

> " We are asked in this case to lay down the converse of that principle. That principle was, however, enunciated in a partition action, where it could conveniently be applied. But I do not feel able to enunciate the converse of that principle in an action *rei vindicatio*."

The case of *Dona Elisahamy vs. Don Julis Appuhamy* (1950) 52 N. L. R. 332 was—like the cases of *Don Andris vs. Sadinahamy*, (1919) 6 C. W. R. 14 *Fernando vs. Fernando II* (1921) 23 N. L. R. 483 and *Jayaratne vs. Ranapura* (1951) 52 N. L. R. 499—a partition action. The facts of that case are similar to those of the two last mentioned cases. The *corpus* sought to be partitioned had at one time formed part of a larger property and was approximately 1/12th of it in area. The predecessors in title of the parties to the action had been the owners of an undivided 1/12th share of the larger property and had possessed this allotment exclusively in lieu of that share and acquired a prescriptive title to it. All the deeds, however, upon which the parties claimed shares in the *corpus* that was the subject of the action described the shares conveyed as fractions of the 1/12th share of the larger property. The plaintiff, whose deeds purported to convey to him a fraction of that 1/12th share, claimed however to be entitled to that fraction of the *corpus* that was to be partitioned. It was held that he could be allotted only that fraction of 1/12th of the *corpus* and not that fraction of the *corpus*. It appears to have been appreciated that what was claimed by the plaintiff was no more than what justice required, but the Court appears to have felt that it was powerless to grant equitable relief. Pulle J., who delivered the judgment in that case, said :—

> " Much as one would wish to give to the plaintiff shares according to his mode of calculation, the authorities are against him ",

and he cited the case of *Fernando vs. Podi Sinno* (1925) 6 C. W. R. 73 in support of that view. He went on to say :—

> " I am not unmindful of the fact that certain inconvenient results would flow from the interpretation which I have placed on the deeds as, for example, the unallotted shares might give rise to further disputes and fresh litigation. The parties and their predecessors are entirely to blame for this situation and I do not think it would be proper to help them out of it by construing their instruments of title in a sense contrary to that laid down by this Court."

With all respect to the learned Judges who decided that case, it seems to me that they have taken an erroneous view that the Court had no power to grant relief against the mistakes of the parties to the deeds that resulted in a misdescription of the property that was dealt with. The authorities, in particular the decision in *Fernando vs. Fernando II* (1921) 23 N. L. R. 483 (which is precisely in point but which is not cited), support the contrary view.

In my opinion the case of *Jayaratne vs. Ranapura* (1951) 52 N. L. R. 499 was correctly decided. In this view of the law the appeal fails. I would therefore dismiss the appeal with costs.

CHOKSY A.J.—

In view of the agreement of counsel on both sides at the hearing of the appeal before Dias S.P.J. and Gunasekara J., that on the main point involved in this appeal there was a conflict between the decisions in *Dona Elisahamy vs. Don Julis Appuhamy* (1950) 52 N. L. R. 332 and *Jayaratne vs. Ranapura* (1951) 52 N. L. R. 499 this appeal was referred by the Chief Justice to a Bench of three Judges.

I agree with the view of My Lord the Acting Chief Justice that the three deeds, namely, 8D1 of 1914, 8D2 of 1933 and 8D3 of 1937 cannot be construed as deeds dealing with shares in the smaller land, as, on the face of them, they purport to deal with different shares in a larger land. The authorities, both English and local, conclude that matter.

The first judgment of the District Court, which was set aside *pro forma* on an application for *restitutio-in-integrum* made by the present 8th defendant-respondent, and the judgment of the District Court on the subsequent hearing, dealt with the case on the footing that although the deeds of the parties to the action on the face of them purport to deal with undivided shares in the larger land, the parties in fact intended to deal with shares in the divided portion of land which from 1914 was allotted to the original owner of an undivided one-tenth share in the larger land.

The land forming the subject matter of this action is lot F in a plan made at the amicable partition in 1914. It is of the extent of 1 Acre 1 Rood and 36 Perches, and all the evidence presented to Court was to the effect that lot F represented the undivided one-tenth share in a larger land, of the extent of 7 acres, which undivided one-tenth share belonged to the common predecessor-in-title of all the parties to this action.

I am satisfied upon a consideration of the evidence led in the case, the basis on which parties presented their respective cases to the lower Court, and the basis on which the learned Judge whose judgment is now under appeal dealt with the matter, that although the deeds dealt with undivided shares in the larger land the intention of the parties was to deal with shares in the smaller land. The only contest has been raised by the 9th defendant who sought to cling to the literal wording of the deeds 8D1, 8D2 and 8D3 and that too at the hearing of the appeal. Even his petition of appeal does not raise the point now urged.

I agree with my brother Gunasekara J. that the question with which we have to deal goes beyond the construction of the deeds and relates to the point as to whether the Court can, upon any legal basis, give effect to what appears from the material on the record to have been the real intention of all the parties interested in this *corpus*, including the 9th defendant-appellant, whenever interests were dealt with upon deeds although the deeds undoubtedly do not reflect that real intention.

It is true that in *Don Andris vs. Sadinahamy* (1919) 6 C. W. R. 64 the position was made easy as both sides prayed that the entire land be partitioned although some of the deeds dealt with *koratuwas* or divided portions.

It is correct to say that Bertram C.J. in *Fernando vs. Fernando* (1921) 23 N. L. R. 483 agreed that the *deeds* had to be construed as giving the plaintiff only three-*eighth* of the whole and the defendant one-*eighth* of the entire land, but he awarded to the plaintiff three-fourths and the defendant one-fourth of the smaller land because the question was not "what is the precise *share* stated in the deeds.....but in what *proportion* as between plaintiff and the defendant is the land to be divided". He agreed that the principle laid down in earlier decisions was that "a purchaser who acquires an undivided share of a land is only entitled to the same undivided *share* of any specific portion of the land when the partition of that portion is under consideration". He, however, points out that in certain circumstances justice requires that the specific portion must be divided in the same *proportions* as the shares set out in the deeds bear to one another. The shares were left undisturbed as they appeared on the deeds but in dividing the smaller *corpus* he gave the land to the respective parties in the same proportions which the share of each bore to the share of the other. As plaintiff got on his deeds proportionately three times as much as the defendant got, he gave the plaintiff three times as much as he gave the defendant.

In the present case the 8th and 9th defendants held their interests in lot F in equal proportions. By 8D2 and 8D3 all interests of the 9th defendant in lot F, in the smaller land (or for that matter even in the larger land), passed to the 8th defendant. Therefore applying the decision in *Fernando vs. Fernando* (1921) 23 N. L. R. 483 the 9th defendant should get nothing and the 8th defendant should get half of lot F as awarded to him by the learned District Judge in the judgment under appeal. Our Courts being also Courts of equity, Bertram C.J. said that justice between the parties which equity and good conscience required should be done between them. It was clear in that case, as it is here, that what

the parties intended to do was not what appeared on the face of the deeds, and what appeared on the deeds was not through intention or design but due to an inaccuracy in description. It is possible that the foundation of the order made by Bertram C.J. may be based on another ground than the jurisdiction of the Court to rectify an erroneous description and make order in accordance with the true intention of the parties—namely section 96 of the Evidence Ordinance. The deeds here (as there) refer to undivided shares in a larger land which has ceased to exist as a separate and distinct entity, in the present case 19 years prior to 8D2 and 23 years prior to 8D3. See *Mensi Nona vs. Neimalhamy* (1927) 10 C. L. Rec. 159. These deeds may therefore be regarded as " unmeaning in reference to existing facts ". The parties were dealing with interests in a land of 1 Acre 1 Rood and 36 Perches (which at the dates of these deeds had the metes and bounds depicted on the relative plan) and not with interests in the larger land as it was previous to the amicable division in 1914. If at the respective dates of these deeds the parties to this contest, namely, the 8th and 9th defendants, were asked whether they were dealing with undivided interests in the larger land their answer would undoubtedly have been an emphatic negative.

The identity and integrity of the larger land of 7 acres, as a separate and distinct land, in which Johanis Perera (the common predecessor of all the parties to this action) and others with him had shares—Johanis having only one-tenth —had vanished. Their status as co-owners of that larger land had been put an end to by common consent. The several co-owners of it had cut themselves adrift from one another. The land itself had been fragmented into many lots—up to lot J at least. Therefore, to hold them or any of them as still thinking in terms of fractions of the larger land and dealing with those shares, 19 and 23 years later, is to produce an unrealistic result. No doubt one can " reconstruct " the picture as it was prior to the partition in 1914 but parties in 1933 and 1937 were bent on dealing with a land as it then existed. When these deeds therefore contained a description of a land of seven acres, and which could not apply to the existing entity, could it not be said that their language was " unmeaning in reference to *existing* facts " ?

It would be unreasonable to impute to parties an intention which is inconsistent with their whole conduct in reference to the transaction in question. In his evidence the 9th defendant never said that he intended to deal with an undivided half of one-tenth of the larger land. He pretended that he did not know anything about these deeds which he admitted he nevertheless signed. He also took up the disingenuous position that his signature was obtained on the footing that he was conveying the house on this land that is the *corpus*. He did not even cross-examine the 8th defendant on the footing that what she was buying on 8D2 and 8D3 were interests in an undivided one-tenth share of the larger land of 7 acres. As I have said, the present contention was not even put forward in the 9th defendant's petition of appeal.

I however do not wish to decide this case on the basis of section 96 of the Evidence Ordinance as it was not dealt with in the argument before us although it could be used even perhaps to support the decision in 23 N. L. R. 483. By applying that decision and holding that the 8th defendant gets the entirety of the interests of the 9th defendant, one does not run the risk in this case of " any inconvenient results " referred to by Pulle J. in *Dona Elisahamy vs. Don Julis Appuhamy* (1950) 52 N. L. R. 332. All the interested parties are before Court. No others are effected. The vendor himself is before Court although he seeks to make an unconscientious use of what is after all an erroneous description, unlike the vendor in *Lucyhamy vs. Perera* (1938) 40 N. L. R. 232 who frankly admitted the true position.

I agree with the observations of Gratiaen J., quoted by my brother Gunasekara J. from *Jayaratne vs. Ranapura*, (1951) 52 N. L. R. 499 that possibly " the correct solution may lie in the jurisdiction of a Court to rectify or treat as rectified documents in which by a mutual mistake the true intention of the parties is not expressed ". The reference in *Don Andris vs. Sadinahamy* (1919) 6 C. W. R. 64 to " the real intention of the parties....." by de Sampayo J. seems to confirm that view.

The question is what is the relief that the Court should grant in these circumstances. I am in agreement with the view of my brother Gunasekara J. that this Court has power to grant relief against a mistake in the deeds of parties which results in a misdescription of the *corpus* which parties intended to and believed themselves to be dealing with. In that view of the matter I feel that the Court could have granted the relief which was asked for by the plaintiff in *Dona Elisahamy vs. Don Julis Appuhamy* (1950) 52 N. L. R. 332.

I have considered whether the case should be sent back to enable the necessary plea to be put forward in a formal manner and further proceedings thereon. I do not think it necessary to do so more especially as there has already been

considerable delay, including two trials and an application for *restitutio* in between. I am also influenced in this decision particularly having regard to the course which the matter has taken. In her answer in June, 1946, the 8th defendant set up her claim to the whole of the one-fourth of the 9th defendant to lot F. In his answer the 9th defendant, in July, 1946, took up the position that Kirinelis the father of the 8th and 9th defendants was entitled to an undivided half of the *corpus* (not an undivided half of one-tenth of the larger land) and that on 8D1 of 1914 he got half of Kirinelis' interests and that the 9th defendant had been in possession of one-fourth of the *corpus* sought to be partitioned, that is lot F and not the larger land, since 1914, and claimed prescriptive title to one-*fourth* of the *corpus*. It is true that he pleaded that 8D2 and 8D3 do not refer to the *corpus* and stated further that these two deeds were not acted upon but he led no evidence on these points at either trial.

In *Fernando vs. Fernando* (1921) 23 N. L. R. 266 this Court granted rectification without any plea asking for it and without sending the case back despite the fact that the lessor upon the lease which was treated as rectified by the Appeal Court was not even a party to the case, whereas we have both the vendor and the vendee before us and it is the vendor who has put forward a claim which is " thoroughly unconscientious ".

In *Goonesekera vs. Van Rooyen* (1926) 7 C. L. Rec. 88 Jayawardena J. held that a deed on which the plaintiff relies could be rectified in the course of a partition action provided all the necessary parties were before the Court if a mistake in the deed is discovered after the institution of the action, as was the case here also. In the circumstances of that case he converted a partition action into an action for declaration of title because certain parties who were necessary to the rectification were not before the Court and could not be made parties to a partition action. Even in sending it back he made it clear that the appellants who had absolutely no merits were to be bound by the finding of the Appeal Court that they had intended to convey two lots instead of one and that plaintiffs there were entitled to a rectification and that it would not be open to the appellants to raise those questions again as a result of the case being remitted to the lower Court. I do not think it makes a difference that here it is the deed of the defendant that is being treated as rectified. In the absence of circumstances justifying a remission to the Court below, I am not prepared to send the case back.

I agree that the appeal should be dismissed with costs.

Appeal dismissed.

Present : GRATIAEN, J. & PULLE, J.

B. J. H. BAHAR vs. T. K. BURAH & TWENTY-FIVE OTHERS

S. C. 481/L—*D. C. Tangalle* 5838

Argued on : 11th July, 1952.
Decided on : 7th August, 1952.

Prescription—Acquisition of rights by—Administrator and heir in possession for over ten years of property of deceased qua administrator—Refusal to acknowledge rights of some co-heirs—Administrator's failure to divest himself of his representative character—Can he acquire prescriptive rights to such interests—Administrator's right to acquire prescriptive right as against some co-heirs—Fiduciary character of Administrator's office—Is he an express trustee ?—Section III of the Trusts Ordinance.

D. B. a married Muslim lady died intestate in 1926 leaving her husband (the 1st defendant) and two infant children (2nd and 3rd defendants). It is not contested that according to Muslim law the deceased's parents also became her intestate heirs in addition to her husband and children. D. B.'s father himself died intestate shortly afterwards leaving his widow (4th defendant) and his three sons (the plaintiff and the 5th and 6th defendants) who succeeded to his interests in D.B.'s estate, which was duly admitted to administration and letters of administration were issued to her husband the 1st defendant, and the property, the subject matter of the action was correctly inventorised and the 1st defendant entered into possession thereof as administrator.

The plaintiff instituted this action to partition the property and 1st defendant disputed the rights of the plaintiff and the 4th, 5th and 6th defendants. The learned District Judge after hearing evidence dismissed the plaintiff's action on the ground that he and 4th, 5th and 6th defendants had lost their rights by virtue of the provisions of section 3 of the Prescription Ordinance. The District Judge also held that the 1st defendant as administrator and as an heir of D.B.'s estate had consistently and unequivocally refused to acknowledge her parent's claims to heirship and had since about the year 1930 possessed the property on behalf of himself and his minor children on the footing that the property belonged exclusively to them.

The plaintiff appealed—

Held : (1) That in the absence of evidence to establish that the 1st defendant had divested himself of the representative character in which he first he entered upon the land in such a manner as the law would consider sufficient to relieve him of the fiduciary obligations attaching to his office, he cannot be held to have converted his possession *qua* administrator into possession *ut dominus* to enable him to acquire a prescriptive right against the other co-heirs to whom he stood in a position of fiduciary relationship.

(2) That the duration of the status of an administrator in relation to property which he has taken over in the exercise of his powers of administration and which he still retains in his hands is indicated in the provisions of sections 540 of the Civil Procedure Code. His office endures until the death of the administrator or the completion of the administration whichever first occurs.

(3) That whenever an administrator enters in that capacity upon property belonging to a deceased's estate, the law requires him to act in a fiduciary relation in regard to it, and a Court of Equity imposes upon him all the liabilities of an express trustee and will call him an express trustee of an express trust and section III of the Trusts Ordinance becomes applicable.

(4) An administrator in possession of property belonging to the estate owes an equal duty by virtue of his office to all the intestate heirs without discrimination and so long as that fiduciary relationship subsists, the law will not permit him to say that he held the property for the benefit of only those to whom he was bound by special ties of kinship or affection.

Cases referred to : *Corea vs. Appuhamy* (1912) 15 N. L. R. 65.
Nagenda Marikar vs. Mohammad (1903) 7 N. L. R. 91.
Arunalaslem Chetty vs. Mootatamby (1906) 2 A. C. R. 90.
Ramalingam vs. Kalasipillai (1942) 43 N. L. R. 425.
Ramalingampillai vs. Adguwad (1942)43 N. L. R. 361.
Suppramanian Chetty vs. Palainappa Chetty (1904) 3 Bal. 57.
In re Baban (1891) 1 C. L. R. p. 41.
Valipillai vs. Ponnasamy (1913) 17 N. L. R. 126.
Perera vs. Simno (1915) 4 Bal. N. C. 77.
Fernando vs. Fernando (1914) 18 N. L. R. 24.
Nonohamy vs. Punchiappuhamy (1929) 31 N. L. R. 220.
Soar vs. Ashwell (1893) 2 Q. B. 390 at p. 397.
Antho Pulle vs. Christoffel Pulle (1889) 1 N. L. R. 120.
Fernando vs. Fonseka (1912) 15 N. L. R. 398.
Arunasalam Chetty vs. Somasunderam Chetty (1920) 21 N. L. R. 389.
Supramaniam vs. Erampakurukal (1922) 23 N. L. R. 417.
Burdick vs. Garrick L. R. 5 Ch. 233.

H. V. Perera, Q.C., with *J. M. Jayamanne* and *J. N. David*, for the plaintiff-appellant.
N. E. Weerasooria, Q. C., with *C. V. Ranawake*, for the defendants-respondents.

GRATIAEN, J.

The facts which arise for consideration on this appeal are beyond dispute. A young married woman named Dhane Bahar died intestate on 18th October, 1926, leaving her husband (who is the 1st defendant) and two infant children (who are the 2nd and 3rd defendants). The learned trial Judge has held that according to the Muslim law which is applicable the deceased's parents—namely, the late Mr. B. J. H. Bahar and his widow the 4th defendant—also became her intestate heirs in addition to the 1st, 2nd and 3rd defendants. No arguments were addressed to us in this Court to suggest that this conclusion was wrong, and I must assume for the purpose of this appeal that it is correct.

The late Mr. Bahar himself died intestate shortly afterwards, leaving as his heirs his widow (the 4th defendant) and his three sons (the plaintiff and the 5th and 6th defendants) who thereby succeeded to his interests in his daughter's estate.

Dhane Bahar's estate was duly admitted to administration in Testamentary action No. 995 of the District Court of Tangalle, and letters of administration were issued without opposition to the 1st defendant by virtue of his undoubted preferential claim to the appointment as the deceased's widower. The property which is the subject matter of this action, comprising 10 allotments of land slightly exceeding 78 acres in the aggregate, were correctly inventorised as

forming part of the deceased's estate, and the learned District Judge has held that, subject to the issue of prescription, the plaintiff and the 1st to the 6th defendants inclusively were in accordance with the Muslim law, co-owners of the property in the proportions set out in paragraph 11 of the plaint. The plaintiff instituted this action on 17th September, 1948, for the partition of the property on this basis. The 7th to the 16th defendants intervened in the action to obtain recognition of their admitted interests as planters who had improved the property.

The learned District Judge, after hearing the evidence, dismissed the plaintiff's action on the ground that the title of the plaintiff and of the 4th, 5th and 6th defendants had been defeated by prescription before the action commenced. He held that the 1st defendant who, as adminsitrator and as an heir of his deceased wife's estate, had consistently and unequivocally refused to acknowledge her parents' claims to heirship, had since about the year 1930 possessed the property on behalf of himself and his minor children on the footing that the property belonged exclusively to them. The learned Judge accordingly decided that, by virtue of the provisions of section 3 of the Prescriptive Ordinance, the original rights of the 1st, 2nd and 3rd defendants as intestate heirs of Dhane Bahar became enlarged into full joint ownership at the expense of the other co-owners.

I have examined the evidence led at the trial, and I am satisfied that, if the nature of the possession of the property by the 1st defendant which commenced in 1930 could properly be regarded as that of a co-owner *simpliciter* or as that of a mere agent, there was probably sufficient proof of an " overt ouster " to support the plea of prescription in accordance with the rules laid down by the Privy Council in *Corea vs. Appuhamy* (1912) 15 N. L. R. 65 and in *Nagenda Marikar vs. Mohammad* (1903) 7 N. L. R. 91 respectively. But the issue in the present case is complicated by the circumstance that the 1st defendant had in the first instance not entered into possession of the property *in his own right* but by virtue of the statutory powers and duties vested in and imposed on him *as the duly appointed administrator of his wife's estate.* Admittedly his *de facto* possession of the property has continued without interruption ever since, but at no stage did he divest himself of the representative character in which he first entered upon the land in such a manner as the law would consider sufficient to relieve him of the fiduciary obligations attaching to his office. In that state of things, he cannot, in my opinion, be heard to say that there arose some point of time when his possession *qua* administrator became converted into possession *ut dominus* to the detriment of the other co-heirs to whom he stood in a position of fiduciary relationship.

The 1st defendant did not choose to take any of the elementary precautions available to him under the Civil Procedure Code. He would very well have taken steps to protect his own interests in the property which had come into his hands as administrator so as to prevent any conflict between his subsequent possession with the responsibilities attacting to his office. Having first settled, out of the assets available to him, the claims of the creditors which had been brought to his notice, he should have applied for and obtained a judicial settlement of his accounts and then proceeded, after an *inter partes* adjudication as to the disputed claims of his parents-in-law to heirship, to obtain a decree under section 741 for the distribution of the estate (including the property in dispute) remaining in his possession among the heirs. In that event, he could properly have claimed that, as far as the property in dispute was concerned, he had " completed the administration " within the meaning of section 540 and thus become free to possess his share of the property and that of his minor children in his own right and on their behalf.

So much for what the 1st defendant might have done. Let us now consider what he did in fact. On 23rd September, 1929, he purported to file what is popularly but somewhat loosely described as a " final account " whereby he " charged " himself *qua* administrator with a sum of Rs. 28,435 (including the inventorised value of the property in dispute) and " credited " himself with various expenses and disbursements amounting to Rs. 2,806·46 " leaving "—to quote his signed statement P13—" *a balance of Rs.* 25,629 *to be distributed to those entitled thereto.*" He did not however obtain a judicial settlement of his account or even have it " passed " by the Court in accordance with some less formal procedure which, though not sanctioned by the Code, seems to have gained increasing popularity with executors and administrators in recent years. Nor did he invite the Court to inquire into the disputed claims to heirship which had been notified to him and to the Court by Mr. Bahar and the 4th defendant. Instead, he continued, exactly as he had previously done, to possess the property in dispute until the present action

commenced. Can he now be heard to say that he had long since divested himself of the character of an administrator by reason of what the learned District Judge seems to regard as a "*de facto* distribution" of the property to himself on his own account and on account of his two children? As I understand the law relating to the duties and responsibilities attaching to the office of an administrator, I think that, for the reasons which I shall now proceed to set out, this is an entirely untenable position.

We must not permit ourselves, by a process of loose reasoning or by an imperfect appreciation of the *ratio decidendi* of certain earlier rulings of this Court, to assume that an administrator who has failed to obtain a judicial settlement of his accounts or to secure a decree for payment and distribution of assets under section 740, can too readily be regarded as having divested himself of his judiciary status. The question whether an estate has been "closed" or not, and whether the assets in the administrator's hands have been distributed or not, is always a question of fact to be determined with special reference to the particular circumstances of a given case. For instance, when a creditor sues an administrator for the recovery of a debt alleged to have been incurred by the deceased, the administrator can successfully plead *plene administravit* if he proves that he has already parted with the assets in his hands by the settlement of the claims of other creditors or by their distribution among the heirs. *Arunalaslem Chetty vs. Mootatamby* (1906) 2 A. C. R. 90; *Ramalingam vs. Kalasipillai* (1942) 43 N. L. R. 425 and *Ramalingampillai vs. Adguwad* (1942) 43 N. L. R. 361. In such cases the maintainability of the plea of *plene administravit* is not necessarily concluded by the administrator's failure to protect himself by obtaining a formal judicial settlement of his accounts. Indeed, the real issue arising upon the plea is whether or not the administrator still retains assets out of which the creditor's claim can be met wholly or in part. *Suppramanian Chetty vs. Palainappa Chetty* (1904) 3 Bal. 57. If, to take a situation of a different kind, an administrator who claims to have closed the administration *de facto* is subsequently confronted with a claim by an heir for judicial settlement or for some other form of relief in the testamentary proceedings, different considerations would apply according to the circumstance of the particular case. *In re Baban* (1891) 1 C. L. R. p. 41 *Valipillai vs. Ponnasamy* (1913) 17 N. L. R. 126 and *Perera vs. Simno* (1915) 4 Bal. N. C. 77. Mr. Weerasuriya argued that, in the testamentary action with which we are now concerned, the time for an adjudication as to Mr. and Mrs. Baher's claims to heirship had long since passed. I do not agree. These claims had been duly notified to the Court and to the administrator, and the time for their adjudication would only have arisen if and when a decree for distribution among the heirs was applied for. Indeed, a consideration of that issue at an early stage, being immaterial to the question as to who should be appointed to administer the estate, would have been premature. *Fernando vs. Fernando* (1914) 18 N. L. R. 24. The contrary opinion expressed by Lyall Grant, J. in *Nonohmay vs. Punchiappuhamy* (1929) 31 N. L. R. 220 is at best an *obiter dictum*, for in that case Dalton, J. and Lyall Grant, J. were merely considering the validity of a belated claim to heirship by a person who was in fact held not to be an heir.

The present action is not concerned with the claim of a creditor or an heir in respect of assets belonging to the estate which have ceased to remain in the administrator's hands. On the contrary, it is concerned with the claims of certain intestate heirs to a declaration as to their title to the deceased's property which had in the first instance come into the hands of the administrator *qua* administrator, and which still remained in his possession and under his control when the action commenced. His defence is that he had defeated that title by his adverse prescriptive enjoyment, partly in his own right

and partly as the natural guardian of his minor children, commencing at some date after he had taken possession of it *qua* administrator.

In the circumstances of this case, the 1st defendant's plea of prescription under section 3 of the Prescription Ordinance is incompatible with the character in which he commenced to occupy the land. In the words of Bowen, L.J., in *Soar vs. Ashwell* (1893) 2 Q. B. 390 at p. 397 " his possession of the property was.....coloured from the first by the trust and confidence in virtue of which he first received it. He never can discharge himself except by restoring (to the beneficiaries, *i.e.*, the true intestate heirs of Dhane Bahar's estate) the property which he has never had otherwise than upon this confidence ". The duration of the status of an administrator in relation to property which he has taken over in the exercise of his powers of administration *and which he still retains in his hands* is indicated in the provisions of section 540 of the Civil Procedure Code. His office, and the fiduciary relationship attaching to it, endures until the death of the administrator or the completion of the administration, whichever first occurs. In the present case, neither of those events having taken place, the 1st defendant's possession of the property in dispute has not yet ceased to be possession *qua* administrator. To my mind, this circumstance effectively disposes of the plea of prescription.

Even before the Trusts Ordinance was enacted, this Court has declared that, as in England, prescription does not run between trustee and *cestui que trust*. *Antho Pulle vs. Christoffel Pulle* (1889) 1 N. L. R. 120. In that case Clarence, J. pointed out that " the Court would watch jealously any proposal to divest the trustee of his fiduciary character ". In *Fernando vs. Fonseka* (1912) 15 N. L. R. 398 Middleton, J. and Grenier, J. decided that " so long as a fiduciary relationship continues, a trustee cannot set up a plea of prescription in bar of a claim by the *cestui que trust* ", and Middleton, J. said, " the fact that the trustee had not strictly carried out his obligations under the trust deed.....cannot be relied upon by him as proving a termination of his fiduciary position ". Both these decisions were concerned with *express trusts*, and the same ruling was authoritatively laid down by the Privy Council in *Arunasalam Chetty vs. Somasunderam Chetty* (1920) 21 N. L. R. 389 where the Judicial Committee, after referring to *Soar vs. Ashwell* (1893) 2 Q. B. 390 at p. 397, indicated that the position would be different in the case of a bare constructive or resulting trust which could not in the special circumstances be equated to an express trust.

After the Trusts Ordinance came into operation in 1918, Bertram, C.J.,held *inter alia* in *Supramaniam vs. Erampakurukal* (1922) 23 N. L. R. 417 that section III (5) was intended to incorporate in statutory form the English rule laid down in *Soar vs. Ashwell* (1893) 2 Q. B. 390 at p. 397. Section III expressly declares that a claim to recover " trust property " shall not be held to be barred or prejudiced by any provision of the Prescription Ordinance, and section III (5) extends the operation of this rule to constructive trusts *in cases where such trusts are " treated as express trusts by the law of England.*

Whenever an administrator enters in that capacity upon property belonging to the deceased's estate, the law requires him " to act in a fiduciary relation in regard to it, and a Court of Equity will impose upon him all the liabilities of an express trustee and will call him an express trustee of an express trust. The principal liability of such a trustee is that he must discharge himself by accounting to the beneficiaries for all such property *without regard to lapse of time* ". Per Lord Esher, M.R. in *Soar vs. Ashwell* (1893) 2 Q. B. 390 at p. 397. Similarly, Giffard, L.J. said in *Burdick vs. Garrick* L. R 5 Ch. 233, " where the duty of persons is to receive property, and to hold it for another, and to keep it until it is called for, they cannot discharge themselves from that trust by appealing to the lapse of time ". These words, if I may say so with respect, perfectly describe the responsibilities imposed on the 1st defendant in relation to the property in dispute, and I would therefore reject his claim to have acquired prescriptive title, either for himself or for his children, to the shares which it was his duty to distribute among the other heirs. The long established rule that " possession is never considered adverse if it can be referred to a lawful title " applies with special and, indeed, with uncompromising force where a trust is impressed upon such possession.

I had suggested to Mr. H. V. Perera in the course of the argument that some distinction might perhaps be drawn between the case of the 1st defendant (whose plea of prescription on his own account must necessarily fail) and that of his minor children (who could not themselves be regarded as affected by any obligation in the nature of an express trust). Mr. Perera conceded, and I am satisfied, that the position of the 2nd and 3rd defendants would have been different if they had effectively received from the administrator certain shares in excess of what they were legally entitled to as heirs, for in that event they could thereafter have relied on their possession *ut dominus* of those additional shares for purposes of prescription. But in the present case, as Mr. Perera points out, it was the administrator and the administrator alone who purported by his own acts of possession to enlarge the rights of himself and his children to the detriment of the others. I agree that this circumstance makes all the difference to the issue of prescription. An administrator in possession of property belonging to the estate owes an equal duty by virtue of his office to all the intestate heirs without discrimination, and, so long as that fiduciary relationship subsists, the law will not permit him to say that he held the property for the benefit only of those to whom he was bound by special ties of kinship or affection.

I would set aside the judgment under appeal, and hold that the pleas of prescription set up on behalf of the 1st, 2nd and 3rd defendants cannot be sustained. The property in dispute belongs to the parties in undivided shares as set out in paragraph 11 of the plaint, and the record must go back to the lower Court with a direction that a decree for partition should be entered allotting shares to the plaintiff and to the 1st, 2nd, 3rd, 4th, 5th and 6th defendants on this basis, subject to the interests and claims of the 7th to the 26th defendants upon which the learned District Judge, after the inquiry, must proceed to adjudicate according to law.

The 1st defendant must pay to the plaintiff the costs of this appeal and of the contest in the Court below. All other costs will be in the discretion of the learned District Judge.

Appeal allowed.

Present : GUNASEKARA, J. & SWAN, J.

C. L. JAINUDEEN vs. P. MURUGIAH

D. C. (F) 140L/1951—D. C. Matale No. L 203

Argued on : 15th and 16th September, 1952
Decided on : 18th September, 1952

Collation—Gift by father to son on the occasion of son's marriage—Mortgage by son—Sale in execution of mortgage—Purchase by plaintiff—Death of father—Administration of his estate—Order in administration proceedings that the value of gifted property was Rs. 6,000 and it must be brought into collation—Does this order amount to a declaration of title in favour of estate—Has S the option to bring the property or paying its value—Matrimonial Rights and Inheritance Ordinance (Cap 47) section 36—Was Roman Dutch Law superseded by this enactment.

P gifted a property in 1927 to his son S who mortgaged it in 1944. In execution of the mortgage decree againsts the property was sold and purchased by the plaintiff who obtained Fiscal's conveyance in 1950 and sued the defendant for declaration of title and ejectment.

P died in 1936 and in proceedings relating to the administration of his estate it was decided by the District Court, Kandy, in 1941 (later upheld by the Supreme Court and the Privy Council) that this property had been gifted to S on the occasion of his marriage and that its value was Rs. 6,000 and that it must be brought into collation.

The defendant, the administrator of P's estate, claims that the order of Court was in effect a declaration of title in favour of the estate and that S was divested of his title thereby and the defendant as administrator was in lawful possession.

The District Judge accepted this view and dismissed plaintiff's action.

Held : (1) That the decision that the property must be brought into collation did not have the effect either of declaring that P's estate was entitled to it or of divesting S of his title under the deed of gift.

(2) That section 36 of the Matrimonial Rights and Inheritance Ordinance (Cap. 47) did not supersede the Roman-Dutch Law which permits an heir to discharge a liability to collation by surrendering the property gifted or paying its true value at his option.

Authorities referred to : *Steyn's Law of Wills in South Africa* (1935) Edn. p. 103.

N. E. Weerasooriya, Q.C., with *Ivor Misso*, for the appellant.
E. B. Wikramanayake, Q.C., with *D. S. Jayawickreme*, for the respondent.

GUNASEKARA, J.

This is an appeal against an order dismissing an action for declaration of title to land and ejectment of the defendant and damages. The property was gifted by one Ponniah to his son Sellasamy in 1927 and the latter mortgaged it in 1944. It was sold in 1949 in satisfaction of a decree for the enforcement of the mortgage and was purchased by the plaintiff, who obtained a fiscal's conveyance in 1950. Meanwhile, Ponniah died in 1936, and in the proceedings relating to the administration of his estate it was decided by the District Court of Kandy on the 3rd February, 1941, that this property had been gifted to Sellasamy on the occasion of his marriage " and that its value was Rs. 6,000 and that it must be brought into collation." The decision was affirmed in appeal by this Court and by the Judicial Committee of the Privy Council. The defendant, who is the present administrator of Ponniah's estate, claims that by this order Sellasamy was divested of his title and the property became part of the estate, and that the defendant is in lawful possession of it as administrator. This view of the effect of the order was accepted by the learned District Judge and the plaintiff's action was accordingly dismissed.

Collation is explained in Steyn's Law of Wills in South Africa 1935 Edn. p. 103 as follows :—

> " Collation is the duty incumbent on all descendants who as heirs wish to share in the succession to an ancestor, either by will or *ab intestato*, of accounting to the " estate of the ancestor for certain kinds of gifts and debts received from or owing to him by them during his lifetime.
>
> Thus, if a child, grandchild or more remote descendant wishes to inherit from a parent, grandparent or remote ascendant from whom he has during his lifetime received any property or money as his portion of his inheritance, or as a marriage gift or otherwise for his advancement in trade or business or such like, he will, before the division of the estate, have to bring into or collate with the estate of such parent etc., either what he may have so received or enjoyed, or the true value of the same at his option, so that the whole estate, thus augmented, may be divided in terms of the will of the testator or according to the law of succession *ab intestato*." "

Relying on this and other citations from text-writers, Mr. Weerasooriya contends that under

the Roman-Dutch Law a child of the deceased person is not liable to collation unless he claims a share in the inheritance and that the liability may be discharged by his surrendering the property or paying its true value at his option; and that, consequently, the effect of the order made on the 3rd February, 1941, in the testamentary case is only that Sellasamy cannot share in the inheritance unless he brings into account the gift or its value. Mr. Wikramanayake's reply is that the Roman-Dutch Law has been superseded by section 35 of the Matrimonial Rights and Inheritance Ordinance (Cap. 47) and that the liability is not dependent upon the heir's claiming a share in the inheritance and is moreover a liability to surrender the property itself to the executor or administrator if it is within his power to do so at the time of the deceased's death, without any option merely to bring into account its value; and that therefore the order in question was in effect a declaration of title in favour of the estate and operated as a cancellation of Ponniah's gift to Sellasamy.

The section is in these terms :—

"Children or grandchildren by representation becoming with their brothers and sisters heirs to the deceased parents are bound to bring into hotchpot or collation all that they have received from their deceased parents above the others either on the occasion of their marriage or to advance or establish them in life, unless it can be proved that the deceased parent, either expressly or impliedly, released any property so given from collation."

This provision no doubt altered the law as regards liability to collation, but it did not give a new meaning to the expression "bring into hotchpot or collation", which was a term of art that was already known to the common law. Moreover, it may well happen that where some of the children are liable to collation, "all that they have received from their deceased parents above the others" is not represented by any specific parcel or parcels of land or any other specific thing, and that the excess can be brought into collation only by bringing its value into account. It seems to me that the context of the expression "bring into hotchpot or collation" in the section confirms rather than negatives the view that the legislature did not intend to take away the heir's option to discharge a liability to collation by bringing the value of the property into account.

In support of the view that the order of the 3rd February, 1941, in effect declared Ponniah's estate to be entitled to the property, Mr. Wikramanayake contended that what was in issue was whether the property was rightly included in the inventory. There was no issue, however, as to the title to the property. The issue as formulated by the District Judge in his order in that case was—

"whether the 1st respondent (Sellasamy) who was given a deed of gift No. 7881 (1R3) by his father Ponniah should bring the property gifted into collation if he wishes to inherit as an heir."

The decision that the property must be brought into collation did not have the effect either of declaring that Ponniah's estate was entitled to it or of diverting Sellasamy of his title under the deed of gift. The judgment that is appealed from must therefore be set aside and the plaintiff must be declared entitled to the property and to have the defendant ejected therefrom. There is no evidence in support of the plaintiff's claim for damages and he is therefore not entitled to a decree for damages. The defendant must pay the plaintiff's costs in this Court and the Court below.

SWAN, J.

I agree.

Set aside.

Present : GRATIAEN, J & GUNASEKARA, J.

A. M. MEERA LEBBE vs. H. A. PIYADASA *et al*

S. C. 9—D. C. Kandy No. Q 757

Argued on : 29th May, 1951
Decided on : 1st June, 1951

Minor, property of—Sale sanctioned by Court after due inquiry—Conclusion of sale by execution of notarial conveyance—Subsequent offer of higher price by prospective purchaser—Can Court set aside such concluded sale.

Held : That where the sale of a minor's property was sanctioned by Court after due and proper inquiry, the mere fact, that some prospective purchaser subsequently turns up, who is willing to pay a higher price for the property, cannot justify the Court in repudiating a concluded sale which has taken place on terms expressly sanctioned by the Court.

Per GRATIAEN, J.—The duty of respecting the sanctity of concluded judicial sales is, I think, at least as important as the duty of protecting the interest of minors.

Cases referred to : *In re Corbett*, 3 S. C. C. 46.
Mustapha Lebbe vs. Martinus, 6 N. L. R. 364.
Muthumani vs. Muthumani, 49 N. L. R. 481.

N. E. Weerasooriya, Q.C., with *O. S. M. Seneviratne*, for the respondent-appellant.

C. Thiagalingam, Q.C., with *N. Nadarasa* and *P. Somathilakam*, for the 1st petitioner-respondent.

N. Nadarasa with *Ratwatte* for the 2nd petitioner-respondent.

GRATIAEN, J.

A young Muslim girl named Abusa Umma was the owner of certain undivided shares in a property in the Kurunegala District. Her mother, who is the third respondent to this appeal, had arranged in December, 1949, to give the girl away in marriage, and had promised, in accordance with custom, to give a sum of Rs. 500 as dowry to the prospective bridegroom. In order to implement this promise, she negotiated with the appellant for the sale of the girl's share of the property, together with her own undivided interests therein, for a sum of Rs. 500. The girl being still a minor, the sanction of the District Court was required before the sale could go through. *In re Corbett*, 3 S. C. C. 46 ; *Mustapha Lebbe vs. Martinus*, 6 N. L. R. 364. An application to Court by the mother was accordingly made on 19th December, 1949, for sanction to sell the property to the appellant for the price agreed upon. On this application the learned Districe Judge made order appointing the girl's mother curator of the property and her paternal uncle her guardian, but before authorising the proposed sale, he called for an inventory of the minor's estate together with a valuation report of the property which was desired to be sold. On 31st January, 1950, the inventory was filed, and a Headman's report was furnished valuing the shares of the property owned jointly by the girl and her mother (in the proportion of 7/8 to 1/8) at Rs. 500. The learned District Judge then took the further precaution of calling for a report from the Secretary of the Court. The report, which recommended the proposed sale, was filed on February 15th, 1950. On 21st February, 1950, the curatrix applied for early consideration of her application as the date of the girl's intended marriage was imminent. The Court considered this application, and called for some further information which was furnished on 25th February, 1950. On that day the learned Judge was satisfied that the proposed transaction was in the minor's interests, and sanctioned the sale of the property upon two conditions (1) that the consideration should be deposited in Court, and (2) that the draft deed should be submitted for approval. The money was duly deposited to the credit of the minor's estate, and the second condition was also substantially complied with in the sense that the draft deed, whose terms are admittedly unobjectionable, was approved by the Secretary of the Court. On 3rd March, 1950, the transfer of the minor's interests in the property was notarially executed and the appellant became the owner of the property.

After the transaction had been completed, two men named Piyadasa and Yakoob Lebbe (who are the 1st and 2nd respondents to this appeal) made independent application to the Court asking that the sale to the appellant should be rescinded on the ground that each of them was willing (and the 1st respondent had in fact arranged) to pay to the curatrix a higher price for the minor's property than the consideration approved for the sale which had already gone through. The 1st respondent also made certain vague allegations particulars of which were not furnished even at a later stage, that the transaction which the Court had approved was vitiated on the ground of fraud and collusion between the curatrix and the appellant.

The learned District Judge held an inquiry into the complaints of the 1st and 2nd respondents and took the view that the allegations of fraud against the curatrix and the appellant had been established. He accordingly made order setting aside the sale of the minor's property. The present appeal is from this order.

I am prepared to assume for the purposes of this case that the 1st and 2nd respondents had the right to intervene in the transactions. I shall also assume, although I do not hold, that the Court possessed inherent jurisdiction to set aside, in proceedings by way of summary procedure, the impugned sale if fraud and collusion between the parties to the concluded transaction could have been established. Giving full effect, however, to the evidence led at the inquiry by the 1st and 2nd respondents, I think that it would be unreasonable to hold that the appellant was a party to any fraud or impropriety which has been imputed against the curatrix. The circum-

stances which the learned Judge seems to have taken into account against the appellant in this connection were (1) that the appellant, pending the Court's approval to his purchase of the minor's share, had bought the curatrix's personal interests in the land at a figure which proportionately was slightly higher, and (2) that the curatrix and her husband, neither of whom gave evidence at the inquiry, had admitted to the 2nd respondent on an earlier occasion that the consideration actually paid by the appellant exceeded the amount sanctioned by the learned Judge and deposited in Court. This latter item of evidence was clearly inadmissible against the appellant, while the earlier circumstance, taken by itself, seems to me quite insufficient to support the allegation of fraud. I would therefore hold that the grounds on which the learned Judge purported to rescind the sale in favour of the appellant have not been substantiated.

There are no other grounds on which the order of the learned District Judge can be supported. No doubt it is the duty of a Court, in exercising its power to control the sale of a minor's property, to take proper precautions to prevent any transaction which is detrimental to the minor's interests from taking place. In the present case the sale to the appellant was sanctioned by the Court after due and proper inquiry. The mere fact that some prospective purchaser subsequently turns up who is willing to pay a higher price for the property cannot justify the Court in repudiating a concluded sale which has taken place on terms which were expressly sanctioned by the Court. It seems to me that the execution of the notarial conveyance in favour of the appellant before the 1st and 2nd respondents intervened makes the facts of the present case very much stronger than those which were considered by a Divisional Bench of this Court in *Muthumani vs. Muthumani*, 49 N. L. R. 481. The duty of respecting the sanctity of concluded judicial sales is, I think, at least as important as the duty of protecting the interest of minors. I would allow the appeal and set aside the order of the learned District Judge dated 22nd May, 1950. The 1st and 2nd respondents will pay to the appellant his costs both here and in the Court below.

GUNASEKARA, J.

I agree.

Appeal allowed.

Privy Council Appeal No. 41 of 1951

Present at the hearing : LORD NORMAND, LORD TUCKER, LORD ASQUITH OF BISHOPSTONE, LORD COHEN

THE COMMISSIONER OF INCOME TAX, COLOMBO vs. MRS. A. J. SUTHERLAND

(EXECUTRIX OF THE ESTATE OF R. W. SUTHERLAND, DECEASED)

FROM THE SUPREME COURT OF CEYLON

Judgment of the Lords of the Judicial Committee of the Privy Council, Delivered the 10th June, 1952

Income Tax—Oral contract of employment—Employment understood to be four-year contract with six month's leave on full pay—Money set aside as leave pay paid to executrix on death of employee—Is such payment a profit under section 6 (2) (a) (1) or 6 (2) (a) (v) of Income Tax Ordinance (Chapter 188) as amended by section 3 of Income Tax Amendment Ordinance No. 25 of 1939 ?—Construction, a matter of law not of evidence—Section 73 (7) (4) of Income Tax Ordinance.

The respondent's husband, Mr. Sutherland, was employed by a company on an oral contract for a period of four years with six months' leave on full pay, and the passage money to be paid by the company for him and his wife. The company paid to the respondent as executrix a sum of money as leave pay which Mr. Sutherland would have been entitled to if he had survived. It was the normal practice of the company to pay leave pay in proportion to the length of service which has elapsed without leave.

The Commissioner of Income Tax sought to assess the amount on the footing that this sum was a profit of the deceased's employment under section 6 (2) (a) (i) or 6 (2) (a) (v) of the Income Tax Ordinance (Chapter 188) as amended by section 3 of the Income Tax Amendment Ordinance No. 25 of 1939. The respondent's contention was that the amount was paid to her personally as a gratuitous payment and not *qua executrix* as a profit of employment due to her husband's estate.

The company in their correspondence exposed contradictory opinion about the character of the sum in question,

Held : (1) That the contract between Mr. Sutherland and the company was a contract for four years' service with six months' leave on full pay and there was no basis for a claim by Mr. Sutherland's executrix for pay in lieu of off leave on his death without having had leave.

(2) That there was no justification for implying a term by which the company would be bound to pay leave pay when no leave was taken, where the normal practice of the company in so doing was not expressly incorporated.

(3) That the payment was made *ex gratia* and not in discharge of a contractual obligation and therefore could not be assessed under section 6 (2) of the Income Tax Ordinance.

(4) That though opinions of the company about the intendment of the contract may have been received under section 73 (7) of the Income Tax Ordinance they are irrelevant and are not in law admissible as aids to the construction of the contract.

(5) That the language of section 73 (7) is very wide but it does not go so far as to authorize the Board of Review to ignore the rule that construction is a matter of law and not of evidence.

Obiter : A statement made in a return is evidence against those who make the return, but statements made by employers in returning the income of an employee are not evidence against him.

LORD NORMAND

This is an appeal from a judgment of the Supreme Court of Ceylon on a case stated by the Board of Review for income tax under section 74 of the Income Tax Ordinance, Ceylon (Chapter 188.) The case was stated on the application of the respondent in order to bring under review a decision of the Board, affirming a decision of the Deputy Commissioner of Income Tax, that a sum of Rs. 15,750 is assessable to income tax in the respondent's hands as executrix of her late husband. The assessment was made on the footing that this sum was a profit of the deceased's employment under the head "leave pay" in section 6 (2) (*a*) (i) or under the head "allownace granted in respect of employment" in section 6 (2) (*a*) (v) of the Income Tax Ordinance (Chapter 188) as amended by section 3 of the Income Tax Amendment Ordinance, No. 25 of 1939. The respondent's contention has been at all stages of the proceedings that the sum was paid as a gratuitous payment to her personally, and not to her *qua* executrix as a profit of employment due to her husband or his estate. She has also put forward alternative contentions which will fall to be considered only if her contention fails.

Counsel for the appellant in opening the case represented that it involved general questions of importance in the administration of the income tax law, but as the argument developed it became apparent that the question of the nature of the payment and its assessability to income tax depended on the special facts of the case.

The relevant provisions of the Income Tax Ordinance (Chapter 188) as amended by subsequent Ordinances to the date of the deceased's death are the following :—

Section 5 (1). Income tax shall, subject to the provisions of this Ordinance be charged in respect of the profits and income of every person.

(*a*) wherever arising, in the case of a person resident in Ceylon, and

(*b*) arising in or derived from Ceylon, in the case of every other person.

Section 6 (1). For the purposes of this Ordinance, "profits and income" or "profits" or "income" means—

(*b*) the profits from any employment ;

Section 6 (2) (as amended by section 3 of the Income Tax Amendment Ordinance, No. 25 of 1939). For the purposes of this section—

(*a*) "Profits from any employment" includes—

(i) any wages, salary, leave pay, fee, pension, commission, bonus, gratuity, or perquisite, whether derived from the employer or others, except the value of any holiday warrant, passage, or other form of free conveyance granted by an employer to an employee, or any allowance for the purchase of any such conveyance in so far as it is expended for such purpose ;

(v) any other allowance granted in respect of employment whether in money or otherwise.

Section 7 (1). There shall be exempt from the tax—

(*k*) any capital sum received by way of retiring gratuity (other than a sum received in commutation of pension) or death gratuity, or as consolidated compensation for death or injuries.

Section 11 (1). Save as provided in this section, the statutory income of every person for each year of assessment from each source of his profits and income in respect of which tax is charged by this Ordinance shall be the full amount of the profits or income which was derived by him or arose or accrued to his benefit from such source during the year preceding the year of assessment, notwithstanding that he may have ceased to possess such source or that such source may have ceased to produce income.

(9) Where any person dies on a day within a year of assessment, his statutory income for such year shall be the amount of profits and income of the period beginning on the first day of April in that year and ending on that day.

Section 27. The executor of a deceased person shall be chargeable with the tax for all periods prior to the

date of such person's death with which the said person would be chargeable if he were alive, and shall be liable to do all such acts, matters, and things as the deceased person if he were alive would be liable to do under this Ordinance.

Section 55 (2). Every person who is an employer shall, when required to do so by notice in writing given by an Assessor, furnish within the time limited by such notice a return containing the names and places of residence and the full amount of the remuneration, whether in cash or otherwise for the period specified in the notice, of—

(*a*) all persons employed by him in receipt of remuneration in excess of a minimum figure to be fixed by the Assessor ; and
(*b*) any other person employed by him named by the Assessor.

(3) Any director of a company, or person engaged in the management of a company, shall be deemed to be a person employed by the company.

Section 69 (1). Any person aggrieved by the amount of an assessment made under this Ordinance may within twenty-one days from the date of the notice of such assessment appeal to the Commissioner by notice of objection in writing to review and revise such assessment. Any person so appealing (hereinafter referred to as " the appellant ") shall state precisely in his notice the grounds of his objection and the notice shall not be valid unless it contains such grounds and is made within the period above mentioned.

(6) In disposing of an appeal the Commissioner may confirm, reduce, increase, or annul the assessment, and shall record his determination in writing and announce it orally.

Section 70 provides for Appeals to the Board of Review against the decision of the Commissioner and Section 73 provides for the regulation of such appeals.

Sub-sections (4) and (7) of Section 73 are as follows :—

Section 73 (4). The onus of proving that the assessment as determined by the Commissioner on appeal is excessive shall be on the appellant.
(7) At the hearing of the appeal the Board may, subject to the provisions of Section 71 (4), admit or reject any evidence adduced, whether oral or documentary, and the provisions of the Evidence Ordinance relating to the admissibility of evidence shall not apply.

74.—(1) The decision of the Board shall be final :

Provided that either the Appellant or the Commissioner may make an application requiring the Board to state a case on a question of law for the opinion of the Supreme Court.

The facts have to be gathered from the case stated and the documents incorporated with it and annexed to it. The respondent's husband, the late R. W. Sutherland, entered the employment of the Colombo Apothecaries Company Limited (hereinafter referred to as the company) as its managing director in November or December, 1939, and continued in that employment till his death on the 12th June, 1946. He had not taken any leave during that period. After his death the company paid to Mrs. Sutherland the sum of Rs. 15,750. The payment was made under the authority of a resolution passed by the directors of the company on the 17th July, 1946, in these terms :—

" The Directors having taken note that a sum of Rs. 15,750 had been placed to reserve to meet the contingent liability to pay for Mr. Sutherland's leave pay which he would have been entitled to if he had survived, it was decided to pay Mrs. Sutherland's passage to England and to authorise a payment to her of Rs. 15,750 which amount was accordingly paid to Mrs. Sutherland."

The reserve was created by setting aside annually a sum equal to one and a half month's salary. The cheque for the amount was sent to the proctors for Mr. Sutherland's estate and it was drawn in their favour. They paid the sum, less a small and unexplained deduction, to a Mr. Adamson, who appears to have held a Power of Attorney for Mrs. Sutherland, and he paid it to her as a sum free from all tax liability. The company on the 15th March, 1947, made a return of Mr. Sutherland's income from employment for the period 1st April, 1946, to the date of his death. The return was made by entering figures in blank spaces on a form which categorized the income from employment under a series of headings. Thus the first item is " gross salary Rs. 3,550 " where the figure alone had to be filled in by the company. One of the items is " Leave Pay Rs....." and opposite it the company entered no figure, but left the space for the figure blank. Another item is " Other remuneration (if any) Rs....." There again the company left the space for the figure blank. But opposite this item it entered a note " Overdue leave pay Rs. 15,750 paid Messrs. Julius & Creasy, Administrators of the Estate ". It was in consequence of this note that the assessment, made under section 11 (9) above cited for the period 1st April, 1946 to the 12th June, 1946, in the year of assessment 1946-47, included the sum of Rs. 15,750. The facts with regard to the deceased's contract of employment are set out in statement 3 of the Case, where two paragraphs are incorporated from a letter, D8 of the documents, written by the company's accountants in reply to an enquiry by the assessor. The first of these paragraphs reads :—

" We advise that there is no written agreement to show the late Mr. Sutherland's contract of service with this Company. It has however been the normal practice of the Company to pay leave pay in proportion to the length of service which has elapsed without leave."

The second paragraph reads :—

" Mr. Sutherland took up duties as Managing Director in December, 1939, and although there was nothing in writing, he was understood to be on a normal four-year contract, with six months' leave on full pay and the passage money to be paid by the Company for him and his wife."

Statement 3 continues with this finding by the Board :—

" It is common ground that the deceased's contract of service was for the normal 4-year period 6 months' full pay leave and the cost of passages to the United Kingdom for himself and his wife."

The members of the Board of Review who heard the appeal were not unanimous in affirming the assessment. The two members who formed the majority held that Mr. Sutherland, though he had never taken leave, was entitled to be paid leave pay in proportion to his length of service without leave. They said that the practice of paying leave pay when no leave is taken is fairly common in mercantile firms in Ceylon and that the leave pay is generally paid when the employee eventually does go on leave or retires. They found that when Mr. Sutherland died on the 12th June, 1946, there had accrued to his account a sum of Rs. 15,750. They were aided in arriving at this conclusion by the construction which they put on the directors' resolution of the 17th July, 1946, and by certain opinions elicited from the company by requests for information addressed to it by its own assessor. The dissenting member of the Board held that if an employee under such a contract as Mr. Sutherland's took no leave he was not entitled to any leave pay, and that his heirs on his death could have no claim. He construed the resolution of the 17th July, 1946, as meaning " had Mr. Sutherland not died a sum would have been available to pay him leave pay ; owing to his death he could not get this. We will however pay that sum to his widow although the deceased was not entitled."

The Supreme Court referred to correspondence between the company, through its officers, and its assessor or the assessor for Mr. Sutherland's estate. In this correspondence the company expressed varying and contradictory opinions about the character of the sum in question. Sometimes it was said that the payment was an *ex gratia* payment to the widow and sometimes that was denied and it was said that it was a sum legally due to Mr. Sutherland at his death. But the court rejected all such expressions of opinion as irrelevant, and their unanimous judgment proceeds upon the term of the contract of employment as set out in statement 3 of the stated case. They held that it was not shewn that the practice by which leave pay was paid when no leave had been taken was part of the contract in Mr. Sutherland's case, and that there was no other evidence that his contract included a term entitling him to claim a money payment in lieu of leave.

When, as in this case, the true question is whether a payment was made *ex gratia* or in discharge of a contractual obligation the primary and best evidence is the contract. If the contract is in writing or, if it is oral but its terms are known beyond doubt, the question whether the payment was contractual depends on the contract alone. But if the contract is oral and if the direct evidence leaves it in doubt whether or not it contained a term providing for the payment, it is legitimate to have regard to the circumstances surrounding the payment and receipt, and in such a case the evidence of the surrounding circumstances may be used to show what the terms of the contract in fact were. But in this case the circumstances attending the payment and receipt of the money are of no assistance. The payment by cheque to the proctors for Mr. Sutherland's estate favours the contention that it was a payment due under the contract of employment. But the language of the directors' resolution, which their Lordships construe in the same sense as the dissenting member of the Board of Review, and all the other circumstances favour the contention that it was an *ex gratia* payment to Mr. Sutherland's widow. No reasonably safe inference about the nature of the contract or its terms can be drawn from these conflicting circumstances. The opinions of the company about the intendment of the contract are irrelevant. Though such opinions may have been received in evidence under section 73 (7) of the Ordinance they are not in law admissible as aids to the construction of the contract. The language of section 73 (7) is very wide but it does not go so far as to authorise the Board to ignore the rule that construction is a matter of law and not of evidence. The note written in the income tax return made by the company, on which the appellant's counsel greatly relied, does not help his argument. A statement made in a return is evidence against those who make the return, but statements made by employers in returning the income of an employee are not evidence against him. In this case, moreover, the return was non-committal on the question whether the payment was contractual, and the note referring to it was very properly written on the return in order that there should be no reproach of non-disclosure of a payment that might eventually be found to have been due under Mr. Sutherland's contract with the company.

It remains to consider the only direct evidence about the terms of the contract. It is to be found in statement 3 of the Case The company was clearly in great doubt about the terms and in the letter D8 it strove to set them out as fairly as it could. The letter, in the two paragraphs quoted in statement 3, purports to deal with two separate things, first the company's normal practice of paying leave pay in proportion to the length of service which had elapsed without leave, and second, the company's understanding of Mr. Sutherland's contract which is described as a normal 4-year contract with six months' leave on full pay. It is the contract so described in the second paragraph that is found by the Board to be common ground between the parties. The respondent is entitled to have the terms of the contract, as described in the letter and found to be common ground, construed in their natural sense and without the addition of unexpressed terms unless they are clearly implied. The words which have to be construed are " a normal 4-year contract with six months' leave on full pay ". Their Lordships find no ambiguity in this description ; it means a contract for four years' service with six months' leave, which leave shall be on full pay. If that is the true construction there is no basis for a claim by Mr. Sutherland's Executrix for pay in lieu of leave on his death without having had leave. the normal practice of the company is not expressly incorporated and there is no need or justification for implying a term by which the company would be bound to pay leave pay when no leave was taken. The contract before the Board therefore did not provide for any payment of leave pay except on a contingency which was never fulfilled, and the respondent has discharged the *onus* which rested on her (Section 73 (4) of the Ordinance) by showing that the payment of Rs. 15,750 was not contractual and was not due to Mr. Sutherland's estate on his death.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed. The appellant will pay the costs of the appeal.

Appeal dismissed.

Privy Council Appeal No. 17 of 1951

Present : LORD PORTER, LORD OAKSEY, LORD RADCLIFFE, LORD ASQUITH OF BISHOPSTONE, SIR LIONEL LEACH

THE ATTORNEY-GENERAL OF CEYLON vs. VALLIYAMMAI ATCHI (Executrix of the Last Will and Testament of K. M. N. S. P. Natchiappa Chettiar, deceased)

FROM THE SUPREME COURT OF CEYLON

Judgment of the Lords of the Judicial Committee of the Privy Council, Delivered the 19th May, 1952.

Estate Duty—Hindu undivided family—Property left by manager of such family—Exempt from Estate Duty—Sections 29, 34, 40, 43, 73—Amending Ordinance No. 76 of 1938 and No. 8 of 1941.

Where the managing member of a Hindu undivided family domiciled in S. India and carrying on business in Ceylon purports by his last will to dispose of the assets of the business on the footing that he was the absolute owner thereof, and the Commissioner of Estate Duty assessed the Estate on the footing that it belonged to the deceased in his individual capacity, and not to the undivided family, and the widow as executrix of the said last will contended that it belonged to the undivided family, and consequently not assessable, and where it was argued that as a matter of procedural law no new evidence could be led before the District Court in an appeal against the Commissioner's order,

Held: (1) That as the evidence clearly established that the estate belonged to the joint family and that the deceased did not die possessed of it as separate estate, it is property falling within the provisions of section 73 of the Estate Duty Ordinance, and consequently no sum was payable in respect of it as Estate Duty.

(2) That in an appeal to the District Court under section 34 of the Estate Duty Ordinance, the appeal is not limited to the question whether the Commissioner had misdirected himself on the evidence before him, and under section 40 of the Ordinance the appellant has the right to lead evidence when he comes before the District Court to contest the validity of an order of assessment approved by the Commissioner.

SIR LIONEL LEACH.

This is an appeal from a decree of the Supreme Court of Ceylon, dated the 24th June, 1949, dismissing an appeal by the appellant, the Attorney-General of Ceylon, from a decree of the District Court of Colombo, dated the 7th May, 1947, and allowing a cross appeal by the respondent, the executrix of the will of her husband, K. M. N. S. P. Natchiappa, a Nattukottai Chettiar, who died on the 30th December, 1938. The deceased, who was the managing member of a Hindu undivided

family domiciled in South India, had for many years carried on business in Ceylon and by his will, which is dated the 3rd December, 1938, he purported to dispose of the assets of the business on the footing that he was the absolute owner thereof. Under the Ceylon Estate Duty Ordinance (No. 1 of 1938) estate duty is payable on the value of the Ceylon estate of a person dying on or after the 1st April, 1937, provided that the value exceeds Rs. 20,000, but the enactment does not apply where the deceased is a member of a Hindu undivided family and leaves no separate estate. In this case the value of assets of the business far exceeded Rs. 20,000, and the Commissioner appointed to administer the Ordinance decided, contrary to the contention of the respondent, that they belonged to the deceased in his individual capacity, not to the undivided family, and consequently he made an assessment. Pursuant to the right of appeal conferred by section 34 of the Ordinance the respondent appealed to the District Court of Colombo. The District Judge held that the property belonged to the joint family and set aside the Commissioner's order. By virtue of section 43 the appellant appealed to the Supreme Court which upheld the judgment of the District Court. The question to be decided in the appeal to Her Majesty in Council is whether the Courts in Ceylon were right in overruling the Commissioner.

Nattukottai Chettiars are money-lenders and traders and for many years the family to which the deceased belonged had transacted business in Ceylon. The deceased's paternal great-grandfather was one Kumarappa who had four sons, one of whom was named K. M. Nachiappa (referred to throughout the proceedings as "Nachiappa No. 1"). Nachiappa No. 1 had two sons, Nachiappa (conveniently described as Nachiappa No. 2) and Suppramanian, the father of the deceased. Nachiappa No. 1 died before 1890. Suppramanian died in the month of March, 1932. Nachiappa No. 1 had carried on business in Ceylon under the *vilasam* of K.M.N. and after his death his two sons continued to do business there under the same *vilasam*.

Nachiappa No. 1 was joint with his sons, Nachiappa No. 2 and Suppramanian, who themselves remained joint until the 22nd January, 1912, when they entered into a deed of partition. There are indications that arrangements for partition were made before that date, but for the purpose of the appeal the severance of joint status may be taken to be the 22nd January, 1912. Nachiappa No. 2 had five sons and Suppramanian one son (the deceased) and three daughters. The deceased had two wives. By his first wife he had five daughters and by his second wife (the respondent) he had five sons. After the partition Suppramanian did business in Ceylon under the *vilasam* of K.M.N.S.P. When he retired to India the deceased took over the management of the business and continued it after his father's death.

On the 30th March, 1939, the respondent's auditor wrote to the Commissioner stating that the deceased was a member of the Hindu undivided family of K.M.N.S.P. and requesting him to certify that by reason of section 73 of the Ordinance estate duty was not payable. Section 73, as amended by the Estate Duty (Amendment) Ordinance (No. 76 of 1938), reads as follows :—

> "Where a member of a Hindu undivided family dies, no estate duty shall be payable—
>
> (*a*) on any movable property which is proved to the satisfaction of the Commissioner to have been the joint property of that family ; or
>
> (*b*) on any immovable property, where is it proved to the satisfaction of the Commissioner that such property, if it had been movable property, would have been the joint property of that family."

The reply to the letter of the 30th March, 1939, was a request for the delivery of a declaration in form prescribed by section 29. The respondent complied and declared the value of the estate to be Rs. 25,27,470·25, but claimed that the property was exempt from estate duty. The claim for exemption was disallowed and under a provisional assessment the amount of duty to be paid by the estate was fixed at Rs. 2,78,021·70, which the respondent was compelled to pay. An additional assessment followed and here the amount of duty was fixed at Rs. 2,90,284·12. The respondent filed notices of objection to these assessments, but on the 11th March, 1941, the Commissioner informed her by letter that he had determined to maintain the assessment, subject to certain variations, which were of a minor nature and call for no comment.

At the time the Commissioner decided to maintain the assessment the Ordinance contained no provision compelling him to hear evidence or receive documents in evidence. By an amending Ordinance (No. 8 of 1941) promulgated after the institution of the appeal to the District Court of Colombo the position in this respect underwent considerable modification. In his judgment the District Judge states that according to the appellant the Commissioner had before him only four documents, namely the notice of objection to the provisional assessment, the notice of objection to the further assessment, the declaration of the respondent under section 29 of the Ordinance and a letter from the respondent's auditor forwarding the declaration. The Assessor of Estate Duty, a subordinate of the Commissioner gave evidence and stated that the Commissioner did not call for any evidence to be placed before

him because he had in mind a decision which he had made in an income tax appeal. Mr. Rewcastle, in supporting the present appeal, has contended that the Commissioner had certain other documents before him when he made the assessment. Accepting this to be the case, it is an undoubted fact that the Commissioner did not call for any evidence, nor did he ask the respondent to satisfy him that her contention was correct. The proceedings in the District Court disclosed that there was much more evidence than that before the Commissioner and evidence of a nature which threw an entirely different light on the case.

Section 34 of the Estate Duty Ordinance is in these terms :—

> " Any person aggrieved by the amount of any assessment of estate duty made under this Ordinance, whether on the ground of the value of any property included in such assessment or the rate charged or his liability to pay such duty or otherwise, may appeal to the appropriate District Court in the manner hereinafter provided."

The section is to be read in conjunction with section 40 which says :—

> " Upon the filing of the petition of appeal and the service of a copy thereof on the Attorney-General, the appeal shall be deemed to be and may be proceeded with as an action between the appellant as plaintiff and the Crown as defendant ; and the provisions of the Civil Procedure Code, and the Stamp Ordinance, shall, save as hereinafter provided, apply accordingly :
>
> Provided that no pleading other than the petition of the appellant shall be filed in any action unless the Court by order made in that action otherwise directs :
>
> " Provided, further, that the decree entered in any action shall specify the amount, if any, which the appellant is liable to pay as estate duty under this Ordinance."

When the appeal came on for hearing the Attorney-General raised certain preliminary objections. He contended that the law applicable was the law of Ceylon, so that as regards movable property the law of the deceased's domicile was irrelevant ; that no appeal lay under section 34 against a decision of the Commissioner under section 73 ; that nothing could be ventilated before the Court which had not previously been put before the Commissioner ; that the respondent was estopped from asserting that the property in question belonged to a Hindu undivided family by reason of representations made by the deceased as the representative of his father Suppramanian to the effect that the latter on his death had left no property ; that certain findings of the Board of Review in income tax proceedings operated as *res judicata* ; and that as the respondent had obtained probate on the representation that the deceased had executed a valid will and was competent to dispose of the property referred to therein she could not be allowed to be heard to the contrary. The District Judge, in an order dated the 15th December, 1942, held that a non-Ceylon domicile did not exclude the operation of the Estate Duty Ordinance upon movable property in Ceylon and, subject to section 73, what constituted the passing of property on a death had to be determined according to the law of Ceylon, that by reason of section 34 a person aggrieved by a decision holding him liable to pay duty was entitled to appeal and the section covered the appeal before the District Court. The question whether there was a Hindu undivided family had been submitted to the Commissioner for his decision and the fact that he had not given a ruling did not preclude the question being raised in Court. The District Judge overruled the contentions that the findings of the Board of Revenue operated as *res judicata* and that the respondent was estopped from disputing the validity of the will.

The judgment of the District Judge on the preliminary objections was carried to the Supreme Court on appeal, but without success, and so far as these objections were concerned the matter rested there. The judgment of the Supreme Court on the preliminary questions was delivered on the 1st May, 1944, and on the 15th November, 1944, the further hearing of the case was begun before the same District Judge. It was continued on the 4th December, 1944, but after that there was no sitting of the Court until the 10th September, 1946, when the matter came before a different District Judge. In the course of the further proceedings the appellant took up the position that, although it has been decided that there was a right of appeal to the District Court, it was not open to the Court to consider any evidence other than that which the Commissioner had before him. The District Judge rejected this contention. Having heard all the evidence adduced by the parties he held that the deceased had not died possessed of separate estate. The property which he had purported to dispose of by his will belonged to the joint family of which he was the head. In accordance with his findings the District Judge made a declaration that the property assessed by the Commissioner as being liable to estate duty was property falling within the provisions of section 73 of the Estate Duty Ordinance and consequently no sum was payable in respect of it as estate duty. He did not, however, direct a refund of the amount which the respondent had been compelled to pay, as he was of the opinion that he had no jurisdiction to do so. The Supreme Count concurred in the findings of the District Judge, except with regard to the question of refund. The Supreme Court held that here the District Judge had erred and

directed the appellant to pay back what had been received from the respondent. The correctness of the decision of the Supreme Court that it had the power to order a refund has not been challenged before their Lordships.

The learned District Judge arrived at his finding that the Ceylon property belonged to the joint family and not to the deceased personally after an exhaustive analysis of the oral and documentary evidence led before him and the Supreme Court in a carefully considered judgment agreed with him. The conclusions arrived at by the Supreme Court were stated by Gratiaen, J., Wijeyewardene, C.J., expressing his agreement. In referring to the will executed by the deceased Gratiaen, J., observed that the motive was to preserve the joint property of the undivided family in the hands of succeeding generations of its male members in such a way that, so far as business acumen and legal ingenuity could achieve the desired end, the laws of Ceylon should in no way prevent the joint property of a Hindu undivided family remaining within the family by survival. He went on to say that he was in complete agreement with the District Judge that the evidence in the case convincingly established that the business carried on in Ceylon by Natchiappa No. 2 and Suppramanian under the *vilasam* K.M.N. was the joint property of the undivided family of which they were both members and that after the division of the property in 1912 Suppramanian continued to carry on the identical business under the new *vilasam* K.M.N.S.P., not on his own account, but as the joint property of the new undivided family of which he was then the head. When Suppramanian retired to India and after his death the business remained in the hands of his son, the deceased, as joint family property and not as separate property possessed by him for his own benefit to the exclusion of the family. In the judgment of the learned Judge as it appears in the printed record the *vilasams* are referred to as K.L.M. and K.L.M.S.P. respectively, but it is obvious that these are mistakes for K.M.N. and K.M.N.S.P.

Mr. Rewcastle suggested that there was not sufficient evidence to discharge the burden which lay upon the respondent of proving that the property belonged to the joint family, but their Lordships who have been taken through the material parts of the evidence, cannot accept the argument. They consider that there is ample evidence to support the finding and they can see no reason which would justify them in departing from their usual practice of refusing to review the evidence for a third time. In delivering the judgment of the Board in *Srimati Bibhabati Devi* and *Kumar Ramendra Narayan Roy*, 1946 A. C. 508, Lord Thankerton pointed out that in order to obviate the practice there must be some miscarriage of justice or violation of some principle of law or procedure, which is certainly not the case here. The principles of Hindu law which have application are not in dispute and they have been correctly applied.

A further contention pressed on behalf of the appellant was that the appeal to the District Court was limited to the question whether the Commissioner had misdirected himself on the evidence before him and therefore the District Judge had erred in determining the appeal as if it were a new trial. This argument ignores the provisions of section 40 of the Ordinance. Not only does section 40 direct that the appeal shall be deemed to be an action and may be proceeded with as such, it expressly applies thereto the provisions of the Civil Procedure Code, which includes directions with regard to the procedure to be followed at the trial of an action and of the calling of evidence by the parties. If further indication that it was the intention of the Legislature to allow an appellant to lead evidence in the District Court is wanted it is provided by the Estate Duty Amendment Ordinance No. 8 of 1941, which came into force on the 26th April, 1941. One of the amendments is the addition to the Ordinance No. 1 of 1938 of section 36A, which requires an appellant to transmit to the Commissioner a list specifying the documents upon which and the names or designations of the persons upon whose evidence the appellant proposes to rely in support of his appeal to the District Court. Another amendment is the addition to section 39 of this sub-section :—

> " (2) Save with the consent of the Court and subject to such terms as the Court may determine, the appellant shall not be allowed at the hearing of his appeal—
>
> (*a*) to produce any document which is not included in the list referred to in section 36A, or to adduce the evidence of any witness who is not mentioned in the list ; or
>
> (*b*) to produce any document which he has failed to produce before the Commissioner when required to do so under paragraph (*a*) of section 37 (2), or to adduce the evidence of any witness whose evidence was not tendered to the Commissioner when called for under that paragraph."

In their Lordships' opinion there is no room for doubt that the Legislature throughout intended that an appellant should have the right to lead evidence when he came before the District Court to contest the validity of an order of assessment passed by the Commissioner.

Their Lordships consider that the judgment of the Supreme Court is right and they will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs of the appeal.

IN THE PRIVY COUNCIL

Present : LORD NORMAND, LORD OAKSEY, LORD REID, SIR LIONEL LEACH

V. L. WIRASINHA, THE COMMISSIONER FOR THE REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS, COLOMBO, vs. MOHIDEEN ABDUL CADER BADURDEEN

V. L. WIRASINHA, THE COMMISSIONER FOR THE REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS, COLOMBO, vs. MOHAMED MOHIDEEN ABDUL CADER

Privy Council Appeals Nos. 34 and 35 of 1951

FROM THE SUPREME COURT OF CEYLON

Judgment of the Lords of the Judicial Committee of the Privy Council, Delivered the 6th October, 1952

Indian and Pakistani Residents (Citizenship) Act No. 3 of 1949, section 6 (2) (ii)—Interpretation of the words "Ordinarily resident"—Section 22—Applicant for registration—Does the minimum period of uninterrupted residence required for the husband have any application to his wife and children.

Held : That a married man, permanently settled in Ceylon, can be registered as a citizen under the Indian and Pakistani Residents (Citizen) Act No. 3 of 1949, although his wife, though ordinarily resident in Ceylon at the date of his application, had not been so resident for the seven years prior to 1st January, 1946 (as required by section 3), and though his minor children have not been ordinarily resident in Ceylon during the whole period of their dependency on him.

LORD OAKSEY

These are two appeals which, though not consolidated, were heard together by their Lordships from two decrees of the Supreme Court of Ceylon dated 24th May, 1951 (Basnayake, J.) reversing orders of the Commissioner for the Registration of Indian and Pakistani Residents dated 7th July, 1950, by which the Commissioner (now the appellant) refused the applications of the respondents for registration as citizens of Ceylon under the Indian and Pakistani Residents (Citizenship) Act No. 3 of 1949 (hereinafter referred to as " the Act ").

The questions raised in the two appeals are identical in point of principle, namely, whether an appellant who is a married man permanently settled in Ceylon can be registered as a citizen although his wife, though ordinarily resident in Ceylon at the date of his application, has not been so resident for the seven years prior to 1st January 1946, nor at all times since their marriage and his minor children have not been ordinarily resident in Ceylon during the whole period of their dependency upon the applicant.

In appeal No. 34* the applicant's wife had been ordinarily resident with the applicant for a period of one year and eight months before the date of his application (on 19th November, 1949) and was so resident at the date of his application, and his minor children, aged 12, 10 and 5 respectively, had been ordinarily resident in Ceylon with him since March, 1948, but had been dependent upon him since their birth. In Appeal No 35 the period of the wife's ordinary residence in Ceylon was one year and eleven months before her husband's application dated 15th November, 1949, and the period of the minor children's ordinary residence in Ceylon was for the same length of time, but they had been dependent upon him since their birth. In appeal No. 35 the period of the wife's ordinary residence in Ceylon was one year and eleven months before her husband's application dated 15th November, 1949, and the period of the minor children's ordinary residence in Ceylon was for the same length of time, but they had been dependent on him since their births on 13th June, 1940, 23rd December, 1942, and 1st February, 1947, respectively.

The question depends upon the true interpretation of the Act and Regulations made thereunder and in particular upon the interpretation of sections 6 (2) (ii) and 22, which are, so far as material, as follows :—

" 6. It shall be a condition for allowing any application for registration under this Act that the applicant shall have—

(1) first proved that the applicant is an Indian or Pakistani resident, and

(2) in addition, produced sufficient evidence.....to satisfy the Commissioner that the following requirements are fulfilled in the case of the applicant, namely—

(ii) where the applicant is a male married person, that his wife has been ordinarily resident in Ceylon, and in addition, that each minor child dependent on him was ordinarily resident in Ceylon while being so dependent : "

" 22. In this Act, unless the context otherwise requires,—

* 44 C. L. W. p 86.

> ' Indian or Pakistani resident " means a person—
> (*a*) whose origin was in any territory which, immediately prior to the passing of the Indian Independence Act, 1947, of the Parliament of the United Kingdom, formed part of British India or any Indian State, and
> (*b*) who has emigrated therefrom and permanently settled in Ceylon,
> and includes a descendant of any such person ; "

It was contended on behalf of the appellant Commissioner before their Lordships' Board, firstly, that having regard to the definition of " Indian and Pakistani Resident " in section 22 of the Act and the regulations which require the applicant to state the period of ordinary residence in Ceylon of the applicant's wife and minor children since the 1st January, 1939, it must be taken to be the general policy of the Act that only applicants who had permanently settled with their families in Ceylon could apply for citizenship. Secondly, that this policy is carried out in section 6 (2) (ii) of the Act by the provision that the wife of a married applicant must have been ordinarily resident in Ceylon and that the minor children must have been ordinarily resident while dependent upon the applicant and therefore that a male married applicant otherwise qualified cannot be registered unless his wife has ordinarily resided in Ceylon from the date of her marriage or since 1st January, 1939, whichever is the later date, and unless his minor children have been ordinarily resident in Ceylon since the date of their births during the whole period of their dependency on the applicant.

Their Lordships are unable to accept these contentions. In their opinion the reasons stated in the able judgments of Mr. Justice Basnayake in the Supreme Court of Ceylon afford the true interpretation of section 6 (2) (ii), which is undoubtedly a difficult section.

It is true that the form prescribed by the Regulations does require a statement by the applicant of the period of ordinary residence in Ceylon of the applicant's wife and of his dependent children since 1st January, 1939, or from the date of the marriage or of birth as the case may be, and that section 21 of the Act provides that every regulation " shall be as valid and effectual as though it were herein enacted " But the mere reference to the date 1st January, 1939, in the relative form does not, in their Lordships opinion, make it necessary or proper to read into section 6 (2) (ii) a provision that the applicant's wife must have been ordinarily resident in Ceylon since that date. For the forms applicable in cases where the residence of dependents at the date of the application only is admitted to be sufficient, contain a similar requirement (see section 4 (2) (*b*) and 4 (3) and forms I C. and I.E. for example). Their Lordships agree with Mr. Justice Basnayake in thinking that the date to which section 6 (2) (ii) most naturally refers is the date of the application, and that the past tense used in the words " has been ordinarily resident " is quite appropriate when speaking of residence at a particular date.

In their Lordships' opinion there are other insuperable difficulties in the way of the appellant's construction. If the words " while being so dependent " in section 6 (2) (ii) mean " during the whole period of the child's dependence " it is obvious and is conceded that in the case of a child born before 1st January, 1939, who had been dependent during the whole period of his life on his father the section might require that the child should have been ordinarily resident in Ceylon for a longer period than its father. Moreover, section 4 of the Act, which provides (2) (*a*) that an applicant may procure the registration of his wife in addition to his own whether or not she herself is possessed of the speical residential qualification which the applicant must possess and the registration of any minor children who may be ordinarily resident in Ceylon and dependent on him, and section 4 (3) (*a*) which provides that the widow of any Indian or Pakistani resident who dies after qualifying for registration may exercise the privilege of applying for registration which her husband could have exercised provided that she has continued to be resident in Ceylon after her husband's death to the date of her application, but regardless of any previous residence, appear to their Lordships to be inconsistent with the construction of the Act for which the appellant contends. It would, in their Lordships' view, be an extraordinary provision that the husband should have to prove, for the purpose of his own registration, that his wife had been ordinarily resident in Ceylon for a longer period than it was necessary to prove in applying for his wife's registration.

There is no express provision in the Act that the husband's permanent settlement in Ceylon must have been achieved in company with his wife and children or that the minimum period of uninterrupted residence required for the husband has any application to his wife or children.

For these reasons, therefore, and for the reasons so clearly stated by Mr. Justice Basanayake, their Lordships will humbly advise Her Majesty that both these appeals should be dismissed. The appellant must pay the costs of the appeals.

Present : GRATIAEN, J. & GUNASEKARA, J.

MANGALESWARI, a minor, by her Next Friend SINNAMMAH **vs.** VELUPILLAI SELVADURAI AND 2 OTHERS

D. C. (F) 21L—*D. C. Chavakacheri* 315

Argued on : 16th May, 1952.
Decided on : 25th June, 1952.

Thesavalamai—Right of pre-emption—Minor—Means to purchase at time of transaction—Notice of sale.

Under the Thesavalamai a co-owner, who had not the means to purchase a share of the common property at the time the transaction took place, cannot succeed in an action for pre-emption on the ground that no notice of sale was given to her.

Case referred to : *Velupillai vs. Pulendra et al* S. C. 462, D. C. Vavuniya 831 ; Supreme Court Minutes of 26-7-51.

H. W. Thambiah and C. *Manohara*, for the 2nd defendant-appellant.

N. E. Weerasooriya, Q.C., with *C. Renganathan* and *K. Balasunderam*, for the plaintiff-respondent.

GUNASEKARA, J.

The second defendant appeals against the judgment given for the plaintiff in this action to enforce a right of pre-emption under the *Tesavalamai*. The plaintiff and her father the first defendant were co-owners of a piece of land which they had inherited in equal shares under her mother's last will in 1935. The subject of the action is the share inherited by the first defendant. This he mortgaged in July, 1936, as security for a debt of Rs. 1,000 and in September, 1937, sold to the second defendant for Rs. 1,500. The mortgage bond which was discharged on the occasion of the sale, describes the debt of Rs. 1,000 as being made up of a sum of Rs. 860 due from the first defendant and his wife (the plaintiff's mother) on a promissory note of April, 1933, and a further sum of Rs. 140 borrowed by him later. A fraction of the share bought by the second defendant was sold in August, 1947, to the fourth defendant, who is the wife of the third. The learned District Judge holds that the plaintiff was entitled to notice of the sale to the second defendant but had no notice of it, and he has accordingly made order setting aside the two deeds of sale and directing that the half share in question should be conveyed to the plaintiff for Rs. 1,500, which he holds was its market value. A condition of the order, that the plaintiff should deposit this sum in Court on or before the 18th December, 1950, has been complied with. The learned Judge has also awarded to the second defendant a sum of Rs. 1,500 as compensation for improvements made by him as a *bona fide* possessor, and this sum too has been deposited in Court by the plaintiff.

The plaintiff, who was born in 1930, and was still a minor when this action was instituted in August, 1950, was only seven years old at the time of the sale to the second defendant. It is contended in support of the appeal that her natural guardian, who was the first defendant, was necessarily aware of the sale to the second defendant and that in any event she had no sufficient means to pre-empt the share, and that therefore she is not entitled to have the sale set aside on the ground of want of notice.

The second defendant averred in his answer that " the plaintiff had and has no means to buy the share sought to be pre-empted ", and one of the issues tried was as to whether the plaintiff was " a *bona fide* pre-emptor having funds to pay for the purchase of this half share." The learned Judge answered this issue in the affirmative for the reason that she " may still be able to find the funds to pre-empt this share by mortgaging her own share ", which he finds has appreciated in value. He holds that it " may be that she has been put up by the first defendant to file this action because the price of lands now is high." The event proved that she was able to raise the necessary funds by the 18th December, 1950, but it seems to be clear from the evidence that her estate was insufficient for the purpose at the time of the sale by the first defendant to the second in 1937. Her father, the first defendant, was a labourer employed at a mill, and it is unlikely that his seven year old daughter was possessed of any property other than the half share of this piece of land that she had inherited from her mother. According to her own evidence, she had no other landed property but she had been told by Sinnammah, her next friend in this action, that her mother

had entrusted to Sinnammah a sum of Rs. 1,000 in cash to be held for her. Sinnammah herself did not give evidence, and there is no evidence from any other source to prove the truth of the information that she is alleged to have given the plaintiff. The learned Judge's own view is that " it is likely that the story that the Next Friend has Rs. 1,000 entrusted to her by the plaintiff's mother is an invention."

As it appears that the plaintiff had no sufficient means to pre-empt the share in 1937 it is immaterial whether she had notice of the first defendant's intention to sell it. As was observed by my brother Gratiaen in the case of *Velupillai vs. Pulendra et al.* S. C. 462, D. C. Vavuniya 831, Supreme Court Minutes of 26-7-51 : " it is fundamental to the cause of action such as is alleged to have arisen in this case that the pre-emptor should establish by positive proof that, had he in fact received the requisite notice, he would and could have purchased the property himself within a reasonable time rather than permit it to be sold to a stranger."

I would allow the appeal and dismiss the plaintiff's action with costs in this Court and the Court below.

GRATIAEN, J.

I agree.

Appeal allowed.

GRATIAEN, J. & GUNASEKARA, J.

GUNARATNE THERO vs. NAYAKE THERO

S. C. 331/L—D. C. Kalutara 27182

Argued on : 9th June, 1952

Decided on : 17th June, 1952

Buddhist Law—Temple—Plaintiff incumbent thereof—Requisition by the military—Demolition of temple—De-requisition—Partial restoration of temple by plaintiff—Claim by plaintiff to have himself declared incumbent—Objection on the ground temple non-existent—meaning of temple—Section 2, Buddhist Temporalities Ordinance.

The plaintiff, who was the lawful incumbent of a long established temple, which had been demolished by the military authorities on requisition so as to render it unfit for use as a place of worship, sought to have himself declared the lawful incumbent. After the premises were handed back by the military, the incumbent and other priests began the work of restoring the temple by first erecting a temporary *avasa* and an image.

The defendant opposed the plaintiff's claim on the ground that the temple had so completely lost its identity and character as to be a " temple " within the meaning of section 2, Buddhist Temporalities Ordinance.

Held : That in the circumstances there was no loss either of the identity of the temple or the status of the incumbent who clearly intended to restore the *status quo* as soon as it was practicable to do so.

Per GRATIAEN J.—If it be the duty of an incumbent to keep the vihare and the other appurtenances of his temple in good order and repair and presumably to take the necessary steps to procure the restoration of any buildings that have been destroyed by some outside agency, I cannot see why even the complete demolition of a " temple " must necessarily operate to divest the incumbent of his office.

Cases referred to : *Romanis Fernando vs. Wimalasiri Thero* (1951) 45 Law Weekly 47.
Terunnanse vs. Terunnanse (1927) 28 N. L. R. 477.

N. E. Weerasooriya, Q.C., with *W. D. Gunasekera*, for the defendant-appellant.

E. B. Wikramanayake, Q.C., with *V. T. de Zoysa* and *D. R. P. Goonetilleke*, for the plaintiff-respondent.

GRATIAEN, J.

The plaintiff sued the defendant on 20th December, 1948, for a declaration that he was the incumbent of a Buddhist Temple by right of pupillary succession to the original incumbent who died in December, 1933. The defendant disputed this right and pleaded in the alternative that " the said temple does not now exist ", so that an action did not in any event lie for a declaration in respect of an allegedly non-existent temple.

The learned Judge, after a very careful analysis of the evidence in the case, held that the

plaintiff had lawfully succeeded to the incumbency upon the death of the original incumbent, and that he had officiated in that office until the entire premises appertaining to the temple were requisitioned by the Crown in 1942 for purposes connected with the prosecution of the war. The premises were de-requisitioned in or about February, 1948, and were returned to the plaintiff.

The only question which was argued before us is whether, having regard to the events which occurred during the period when the premises were under military occupation, the temple had so completely lost its identity and character as a " temple " within the meaning of section 2 of the Buddhist Temporalities Ordinance (Cap. 222) that the plaintiff became divested of his incumbency in consequence ; and if so, whether, after the period of de-requisition was terminated, the character of the temple and the status of the plaintiff had not been sufficiently, if not completely, restored so as to justify a declaratory decree in relation thereto.

On this issue the learned Judge has decided in favour of the plaintiff. He took the view that although the substantial demolition of the buildings by the military authorities had rendered the temple temporarily unfit for use as a place of worship at the time when the premises were restored to the plaintiff, the damage was by no means irreparable. The plaintiff had in fact commenced the work of restoration in May, 1948, but was prevented from bringing it to completion by an interim injunction issued against him at the defendant's instance. The learned Judge was also satisfied that neither the plaintiff nor the other priests had ever formed an intention to abandon the temple permanently. In these circumstances, he decided that the plaintiff was entitled to his declaratory decree. I have not been able to discover any legal principle which compels me to reject this view.

It is certainly correct to say that, at the time when the military authorities restored the premises to the plaintiff, most of the buildings appertaining to the temple had either been effectively demolished or at least rendered uninhabitable for the time being. It is very clear, however, that the plaintiff, as the incumbent, took upon himself most energetically to undertake the work of restoration. A small temporary *avasa* was hastily improvised, and an image was kept there. Nevertheless, it was conceded that persons professing the Buddhist faith had not yet resumed the habit of resorting to the premises as a place of worship.

The definition of a " temple " in section 2 of the Ordinance includes objects of Buddhist worship and " places of Buddhist worship ". As Basnayake, J. pointed out in *Romanis Fernando vs. Wimalasiri Thero* (1951) 45 Law Weekly 47, no particular type of buildings is necessary to constitute a temple. That decision was concerned with a place where a temple had been established by gradual stages on a site acquired for that special purpose. We are here concerned with the converse case, in which a long established temple, controlled and administered by its lawful incumbent, had through necessity ceased for a period to function effectively as such. I cannot conceive that the law requires us to regard this comparatively brief interlude as having destroyed either the identity of the temple or the status of its incumbent who clearly intended to restore the *status quo* as soon as it was practicable to do so.

This action is concerned only with the plaintiff's right to his ecclesiastical office and not with the temporal affairs of the temple. But it is important to bear in mind that appertaining to that office are certain important *rights* and, indeed, *duties* of administration and control. *Terunnanse vs. Terunnanse* (1927) 28 N. L. R. 477. If it be the duty of an incumbent to keep the vihare and the other appurtenances of his temple in good order and repair, and presumably to take the necessary steps to procure the restoration of any buildings that have been destroyed by some outside agency, I cannot see why even the complete demolition of a " temple " must necessarily operate to divest the incumbent of his office.

I would dismiss the appeal with costs, but I desire to say this in conclusion. The judgment which should in my opinion be affirmed does not proceed from any adjudication as to whether or not the property belonging or appertaining to the temple is vested in the plaintiff. Nor does it decide that the plaintiff is the person entitled to receive the compensation payable by the Crown for any damage sustained when the temple premises were under requisition. Should any dispute arise hereafter in regard to any of those matters, I assume that the rights and duties of the Public Trustee, who is entrusted with special supervisory powers under the Ordinance, would prominently arise for consideration by the appropriate Court.

GUNASEKARA, J.

I agree.

Dismissed.

Present : GRATIAEN, J. & GUNASEKARA, J.

A. ALITAMBY vs. R. M. BANDA

S. C. 3/L—D. C. Kurunegala 4594

Argued on : 6th June, 1952.
Decided on : 17th June, 1952.

Registration of Documents—Sale of land subject to usufructuary mortgage—Subsequent sale to another—Prior registration of later deed—Possession by vendee on earlier deed after discharging of mortgage—Possession of usufructuary mortgagee—To whose benefit it enures—Prescription—Registration of Documents Ordinance No. 23 of 1927. Section 7 (1) and (4).

A property subject to a usufructuary mortgage was sold to the defendant on the 9th of August, 1927, and again to the plaintiff on the 10th of August, 1927. The plaintiff's deed P1 was registered prior to the defendant's deed 1D1, but the plaintiff never had any possession of the land. The usufructuary mortgagee remained in possession until 1939 when the defendant redeemed the mortgage and went into possession. In 1947, the plaintiff asked for a declaration of title to the land against the defendant who contended that he had title by long prescriptive possession which had commenced on a valid title derived by purchase.

Held : (1) That the defendant was entitled to the property by prescription as the possession of the usufructuary mortgagee must be presumed to enure to the benefit of the original mortgagor and thereafter to the person to whom the contractual rights of such mortgagor have at any relevant point of time been transmitted or ceded.

(2) The combined effect of section 7 (1) and (4) makes it clear that registration by itself confers no validity on an instrument unless and until a claim is based upon it.

Authorities referred to : *Pabilis Appuhamy vs. Peries* (1945) 46 N. L. R. 116.
Wille's Principles of South African Law (1937 Ed.) page 176.
Appuhamy vs. Goonetillike (1915) 18 N. L. R. 469.
McVity vs. Tranouth (1908) A. C. 60.
Silva vs. Sarah Appuhamy (1883) Wendt 383 at page 384.
Kanapathipillai vs. Mohamadutamby (1912) 15 N. L. R. 177 at 179.

C. Thiagalingam, Q.C., with *V. S. A. Pullenayagam* and *T. Parathalingam*, for the defendant-appellant.

H. W. Thambiah, for the plaintiff-respondent.

GRATIAEN, J.

This is an appeal from a judgment and decree of the District Court of Kurunegala declaring the plaintiff entitled as against the appellant to an undivided half-share of the land described in the schedule to the plaint. The alleged rights, based on the same chain of title, of the 2nd to the 10th defendants to the outstanding half-share were conceded by the plaintiff but were also disputed by the appellant. The appellant's case is that he was the sole owner of the land by virtue of long prescriptive possession which had in the first instance commenced under a valid title derived by purchase. It is common ground that the appellant was in exclusive possession of the land at the time when this action was instituted on 22nd December, 1947.

The land admittedly belonged at one stage to a person named Lebuna Veda who had in 1905 granted a notarially attested usufructuary mortgage over the property in favour of Dingiri Appu Naide. The mortgagee was duly placed in possession under the agreement whereby he was to enjoy the produce in lieu of interest until the principal debt was liquidated. While the bond was still subsisting, Lebuna Veda died leaving a son Kiriya and also a daughter Pini who is alleged to have married out in *diga* and thereby lost her inheritance. There is a suggestion that Lebuna Veda had yet another legitimate child named Hapu, but for the purpose of adjudicating between the claims of the parties in the present action we are required to assume that on Lebuna Veda's death the property in dispute belonged solely to Kiriya by inheritance from his father. The decree in this action, would, of course, not affect any rights which may hereafter be asserted by persons claiming through either Pini or Hapu.

On 9th August, 1927, Kiriya sold his rights in the property to the appellant under the conveyance 1D1. The plaintiff suggests, and the learned Judge seems to suspect, that no consideration had in fact been paid for the transfer, but that circumstance, even if established, cannot alter the legal consequences of the trans-

action. Kiriya's title clearly passed to the appellant upon the execution of the deed subject, of course, to Dingiri Appu Naide's prior rights under the subsisting usufructuary mortgage created in 1905.

The conveyance 1D1 in favour of the appellant was not registered until 13 days later, namely on 22nd August, 1927. In the meantime, Kiriya had once again sold the same property for valuable consideration to the plaintiff and a man named Uduma Lebbe in equal shares by P1 of 10th August, 1927. This deed, though later in point of time, was duly registered 7 days earlier than 1D1 had been. It follows that if the respective claims of the parties to the present dispute be determined solely by reference to their "paper title", the later deed P1 in favour of the plaintiff and Uduma Lebbe (whose rights have since passed by inheritance to the 2nd to the 10th defendants) must prevail over the earlier instrument 1D1 by virtue of prior registration. The appellant's case must therefore stand or fall on the issue of prescription. On that issue the learned Judge has held against him, but Mr. Thiagalingam argues that the judgment under appeal should be reversed even upon the basis of the learned Judge's findings of fact.

The plaintiff concedes that neither he nor his co-purchaser under P1 had possessed the property or even asserted any claim to it from the date of the execution of P1 until very shortly before the present action commenced twenty years later. The appellant, on the other hand, alleged that he had possessed the property continuously and exclusively in his own right from the time of his purchase. This version was, however, rejected by the learned Judge as grossly exaggerated. It was held on the contrary :—

1. that the person in actual occupation of the property from 9th August, 1927 until 30th November, 1939, had been Dingiri Appu Naide, who had in fact possessed it continuously since 1905 as the usufructuary mortgagee under the bond P2 ;

2. that the bond in his favour was discharged by payment on 30th November, 1939 ;

3. that the appellant was thereupon, or very shortly afterwards, admitted to possession by Dingiri Appu Naide on the footing that he was the person who had lawfully succeeded to Kiriya's interests in the land ;

4. that the defendant had since then possessed the land adversely not only to the plaintiff and his alleged co-owners but also, it would appear, to persons claiming through Pini and Hapu.

Admittedly, the final period during which the appellant had personally possessed the property on his own account was by itself insufficient to support a claim to prescriptive title. The real matter for consideration therefore is whether he can claim the benefit of Dingiri Appu Naide's proved occupation during the earlier period as constituting in fact and in law possession on behalf of the appellant as the cessionary, by lawful purchase, of Kiriya's rights under the usufructuary mortgage bond. As against this contention, the learned Judge accepted the argument that, whatever may have been the character of Dingiri Appu Naide's occupation between 9th August, 1927, and 15th August, 1927, his occupation after the latter date (on which P1 was registered) enured by operation of law to the benefit of the plaintiff and his co-purchaser under the later deed which prevailed over 1D1 by virtue of its prior registration.

The learned District Judge did not enjoy the advantage of hearing any argument upon the interesting question of law which was raised before us, and the trial proceeded upon the assumption that Dingiri Appu Naide's occupation after 15th August, 1927, would, if established effectively, repel the plea of prescription. Hence, presumably the appellant's distorted version of what actually occurred during the crucial period.

We have not been able to discover any earlier precedents which precisely cover every aspect of the problem, but after giving my best consideration to the arguments of learned Counsel, I have taken the view that Mr. Thiagalingam's argument should be upheld.

It is implicit in the trial Judge's findings of fact that no privity of contract with Dingiri Appu Naide had been directly established at any point of time between 9th August, 1927, and 30th November, 1939, *either* by the appellant claiming under 1D1 on the one hand *or* by the plaintiff and Uduma Lebbe claiming jointly under P1 on the other. Admittedly, Dingiri Appu Naide had entered into occupation of the land under a contractual agreement with his original mortgagor Lebuna Veda, and his continued occupation must therefore be regarded as a precarious occupation for the benefit, during the initial period, of his immediate mortgagor—and thereafter, for the benefit of those to whom the mortgagor's contractual rights had from time to time been lawfully transmitted or ceded. In *Pabilis Appuhamy vs. Peries* (1945) 46 N. L. R. 116 Keuneman, J. (Jayatilleke, J. concurring) held that "there is a *prima facie* presumption

that the possession of a usufructuary mortgagee enures to the true owner, whether it be the person who actually gave him the usufructuary mortgage *or the successor of that person*". With respect, I would adopt this formula subject to the qualification that Keuneman, J. could not, in this context, have intended that the identity of the "true owner" could legitimately be determined by a consideration of any issue as to *title*. For the rights of the parties (and of their successors in interest) to a usufructuary mortgage flow from contract and not from ownership. Having regard *inter alia* to the rule laid down in section 116 of the Evidence Ordinance, I venture to suggest that the principle which Keuneman, J. did intend to formulate would be more precisely stated thus :—

> "That the possession of a usufructuary mortgagee must be presumed to enure to the original mortgagor and thereafter to the person to whom the contractual rights of such mortgagor have at any relevant point of time been transmitted or ceded".

The law relating to the cession of contractual rights is summarised in *Wille's Principles of South African Law* (1937 Ed.) page 176.

Assuming, as we must do for the purposes of this appeal, that Kiriya was the sole heir of Lebuna Veda, it follows that Lebuna Veda's rights under the mortgage were on his death transmitted to Kiriya and were in turn lawfully ceded by Kiriya to the appellant upon the execution of the conveyance 1D1 of 9th August, 1947. *After that date, Kiriya enjoyed no further contractual rights capable of transmission or cession under the common law.*

Had the situation not been complicated by the supervening circumstance of the prior registration on 15th August, 1927, of the plaintiff's later deed P1, the continued occupation of Dingiri Appu Naide until 30th November 1939, would, quite apart from "paper title", have effectively conferred on the appellant an unassailable title by prescription. *Pabilis Appu vs. Peries* (supra). The real difficulty in this case arises from the question whether, by reason of this circumstance, the impact of the provisions of the Registration of Documents Ordinance (Cap. 101) altered the character of the previous legal relationship subsisting between the appellant and Dingiri Appu Naide.

The substance of Mr. Thambiah's argument is that the prior registration of P1 on 15th August, 1927, not only destroyed the "paper title" of the appellant under the earlier deed but has also automatically operated by what he described as "a statutory legal fiction" to divert to the plaintiff and Uduma Lebbe the benefit which the appellant had previously enjoyed as the lawful cessionary of the rights under the usufructuary mortgage bond in terms of which the mortgagee occupied the property. In other words, it is argued that the bare fact of registration had substituted the plaintiff and Uduma Lebbe as the true cessionaries, of the contractual rights which Kiriya had already ceded in fact and in law to the appellant.

In examining this proposition, one must pay regard to the limited scope and effect of the provisions of section 7 of the Registration of Documents Ordinance (Cap. 101). It is clear enough that, in any competition arising between the appellant's claim to paper title under 1D1 and the plaintiff's *claim* to paper title under the subsequent conveyance from the same source, the latter must prevail by reason of its prior registration. On the other hand, a person who has enjoyed adverse possession (either personally or through an agent or licensee) of the property is not precluded from relying on such possession, *both before and after the date of registration of the opponent's deed*, for purposes of acquiring prescriptive title to the land. For, as Sampayo, J. explains in *Appuhamy vs. Goonetillike* (1915) 18 N. L. R. 469, "the benefit of prior registration is given to an instrument only against (another) instrument. *Such registration only affects titles based on the instruments*, and has nothing to do with titles acquired otherwise than upon such instruments. The title by prescription is acquired by acts of possession, and I fail to see that the registration of the deed by the owner against whom prescription is running affects the provisions of the Prescription Ordinance. The registration of a deed cannot be regarded as the interruption of a possession which as a matter of fact continues. Prescription is a mode of acquisition independent of any documentary title which the possessor may at the same time have and although the one may be defeated by the operation of the Registration Ordinance, the other remains unaffected". Wood Renton, C.J. took the same view in his separate judgment.

Mr. Thambiah has invited us to hold that the *ratio decidendi* of *Appuhamy vs. Goonetillike* (supra) is in conflict with an earlier ruling of the Privy Council in *McVity vs. Tranouth* (1908) A. C. 60 on an appeal from the Supreme Court of Canada, and that the authority of the local decision as a precedent should therefore be reconsidered. In his treatise on *The Law of the Registration of Deeds in Ceylon page* 120, as Mr. Thambiah points out, the late Mr. A. S. V. Jayawardene did suggest many years ago that "if the same question is raised again it will have

to be considered whether the judgment of the Privy Council did not lay down the sounder and more correct view ".

It would be dangerous to regard the ruling in *McVity's case* (supra) as applicable to the present issue without first examining the extent to which the Canadian laws of prescription and registration of deeds correspond to the systems obtaining in this country. In any event, Lord Macnagten's judgment was concerned with an entirely different problem to that which had engaged the attention of Wood Renton, C.J. and Sampayo, J. in *Appuhamy's case*. In each case the impact of a statute relating to registration on a statute relating to prescription arose for the Court's decision, but it is important to remind ourselves that the word " prescription " can be used in two senses, " *acquisitive prescription* which is a method of acquiring ownership or other real rights in property, and *extinctive prescription* or limitation of actions which deprives a person of his right to bring an action ". *Wille* (*supra*) *page* 129. *Appuhamy's case* deals with the acquisitive, and *McVity's case* with the extinctive species of prescription, so that the analogy and the suggested conflict between the precedents disappear. I therefore regard the *ratio decidendi* in *Appuhamy's case* (supra) as binding upon us. The statutory fiction enacted by section 7 of the Registration of Documents Ordinance is strictly limited by the language of that enactment and has no bearing on questions relating to the acquisition of title under section 3 of the Prescriptive Ordinance. Prescriptive possession is based not on fiction but on reality.

The principle underlying the doctrine of prior registration under the Registration of Documents Ordinance has been very clearly explained by Clarence, J. in *Silva vs. Sarah Appuhamy* (1883) Wendt 383 at page 384 and by Lascelles, C.J. in *Kanapathipillai vs. Mohamadutamby* (1912) 15 N. L. R. 177 at 179. At the date of the second conveyance the vendor has in truth nothing left in him to convey, " but *by the operation of the Ordinance the second conveyance over-rides the earlier deed if registered before it* ". The prior unregistered deed, as Lascelles, C. J. explains, " is deemed void as against the party *claiming* an adverse interest under a subsequent registered deed for *reliable* consideration. The natural and inevitable consequence is that instruments which would otherwise have become inoperative to pass title are clothed with validity ". In other words, the earlier transferee was the person who had in truth succeeded under the common law to the interests of the original owner, but section 7 of the Ordinance confers on the transferee under the later deed, by reason of its prior registration, the right to supplant the earlier transferee by virtue of a superior " paper title " created by statute—*a right which must, however, be " claimed " before the benefit of priority can take effect.* Should the assertion of that right be postponed until the earlier transferee (or someone claiming under him) has acquired a prescriptive title, the statutory protection would be rendered valuless. As my brother Gunasekara pointed out during the argument, the Ordinance provides machinery for the registration of *documents* and not of title. The combined effect of sections 7 (1) and (4) makes it clear that registration *by itself* confers no validity on an instrument unless and until a claim is based upon it.

The legal title to the property which admittedly became vested in the appellant on 9th August, 1927, was not invalidated merely because P1 was duly registered 6 days later; it only *became liable to be invalidated if and when a claim to the benefit of prior registration was asserted against him by the plaintiff and his co-purchasers.* For the same reasons, I conclude that the subsisting legal relationship between Dingiri Appu Naide (as the usufructuary mortgagee occupying the property in that subordinate position by virtue of his contractual rights) and the appellant (as the cessionary of the corresponding rights of the original mortgagor under the contract) was not automatically severed by the mere registration of P1 in the appropriate books maintained under the Ordinance. The character of Dingiri Appu Naide's occupation remained unaltered for a period exceeding 10 years after 9th August, 1927, and it continued throughout that period to enure to the appellant's benefit because it was not interrupted at any stage either physically or in any of the methods recognised by the common law as sufficient to terminate a mutual relationship of that kind—such as, for instance, (*a*) the institution of legal proceedings culminating in a decree compelling Dingiri Appu Naide to recognise the plaintiff as the true owner claiming superior title to that of the appellant, or (*b*) an overt act by Dingiri Appu Naide repudiating his earlier position *vis a vis* the appellant on the ground that the title to the property had subsequently become vested in a stranger who claimed to be the true owner. Nothing of this nature occurred during the relevant period. On the contrary, the presumption that Dingiri Appu Naide's occupation enured to the benefit of the appellant was strengthened and, indeed, confirmed when the appellant was admitted to possession in his own rights after the bond was discharged in 1939. That was conduct which could only be construed in the circumstances as

an acknowledgment by Dingiri Appu Naide of the relationship which the law had previously imputed to them.

I take the view that, for the reasons which I have set out, the appellant was entitled to succeed on the issue of prescription. The plaintiff's claim so far as it was based on a superior " paper title " created (not so much by succession as by statute) was only asserted after it had already been defeated by the operation of section 3 of the Prescription Ordinance. Nor can his belated claim to ownership be legitimately regarded as entitling him retrospectively to the benefit of Dingiri Appu Naide's precarious occupation which had long since terminated. I would set aside the judgment under appeal and make order dismissing the plaintiff's action with costs both here and in the Court below.

GUNASEKARA, J.

I agree.

Set aside.

THE COURT OF CRIMINAL APPEAL

Present : GUNASEKARA, J. PULLE, J. & SWAN, J.

REX vs. B. FRANCIS FERNANDO *alias* LEWIS FERNANDO

Appeal No. 46 *of* 1952 *with Application No.* 69 *of* 1952. *S. C.* 2—*M. C. Colombo* 20980

Argued on : 25th August, 1952.
Decided on : 8th September, 1952.

Court of Criminal Appeal—Dying deposition—Must there be corroboration—Judge's duty to caution jury—Evidence Ordinance, section 32 (1)*—Accused's failure to give evidence—Adverse comment of Judge—No misdirection in the circumstances of the case.*

Where in a trial for murder by stabbing, the accused was convicted on the dying deposition of the deceased as to the circumstances of the transaction, which resulted in his death, and it was contended in appeal that there was misdirection by the Trial Judge on two grounds : firstly, that the learned Judge failed to caution the jury adequately upon the danger of acting on the uncorroborated deposition of the deceased and secondly, that the trial judge had observed that the accused had not given evidence, although in view of the nature of the prosecution case, the accused could have given the jury an account of a sudden fight or of grave and sudden provocation which caused him to lose his self control and stab the deceased and that consequently this comment might have led the jury to infer wrongly that the accused was the deceased's assailant.

Held : (1) That there was on the established facts of the case ample corroboration of the deceased's deposition and that the jury were adequately cautioned as regards the inherent weakness of evidence of this kind.

(2) That the view adopted in *In re Guruswami Tevar* A.I.R. 1940 Madras at page 200 is preferable to the view expressed in *Emperor vs. Akbarali Karimbahai* 1933 A.I.R. Bombay 479 *

(3) That the comment of the trial Judge on the failure of the accused to give evidence did not amount to a misdirection as (*a*) the jury had been directed that the burden of proof on the accused would arise only if the jury were satisfied that the deceased's assailant was the accused and (*b*) that jury had been directed that the onus of proof was on the prosecution to establish the identity of the assailant and the fact that the appellant did not give evidence did not help the prosecution to discharge the obligation.

Cases referred to : *R. vs. Asirvadan Nadar* (1950) 51 N. L. R. 322.
Emperor vs. Akbarali Karimbhai A. I. R. 1933, Bom. 479 at 481.
In re Guruswami Tevar A. I. R. (1940) Madras 196 at 200. 41 Criminal Law Journal of India at p. 487.

V. S A. Pullenayagam, for the accused, appellant.
R. A. Kannangara, C.C., for the Attorney-General.

* The view expressed in the Madras case is as follows :

" It is not possible to lay down any hard and fast rule when a dying declaration should be accepted, beyond saying that each case must be decided in the light of the other facts and the surrounding circumstances, but if the Court after taking everything into consideration, is convinced that the statement is true, it is its duty to convict, notwithstanding that there is no corroboration in the true sense. The Court must, of course, be fully convinced of the truth of the statement and naturally it could not be fully convinced, if there were anything in the other evidence or in the surrounding circumstances to raise suspicion as to its credibility ".

GUNASEKARA, J.

The appellant Lewis Fernando was convicted of the murder of Malwenna Hewage Edwin, a young man of 20, who died of stab wounds inflicted on him on the 11th October, 1951. The appeal was pressed upon two grounds of misdirection that were not included among the original grounds of appeal but were formulated by Counsel after the appealable time had expired. They relate respectively to a comment on the fact that the appellant did not give evidence and to a direction regarding the evidentiary value of a statement made by the deceased man as to the circumstances of the transaction which resulted in his death.

The following facts were proved by the prosecution by evidence that was not challenged in cross-examination or contradicted by other evidence. The deceased was an assistant in a tailor's shop in Pettah, where he had been employed for about a month and a half. He was living in Maradana during that time at the house of his employer Kassivel, but his home was in Hunupitiya, a few miles outside Colombo. The appellant himself lived in Hunupitiya and was a friend of the deceased. On the 11th October, the appellant turned up at Kassivel's house at about 6-30 a.m. and obtained his permission for the deceased to go with him to Hunupitiya to give him a letter that was in a box in the deceased's house. The two of them then left for Hunupitiya, the deceased going "quite happily" with the appellant so far as Kassivel observed. At about 7-30 a.m. they were seen at Hunupitiya walking along a footpath in the direction of the deceased's house, which was about a quarter of a mile away, and they were chatting together as they went. This was in the neighbourhood of the house of a man named Peter Perera which stood some 40 yards away from the path. At about 8 a.m. they arrived together at the deceased's house. There the deceased got from his sister a photograph of himself, which he said the appellant wished to see, and also a letter that he had left with her, and the two men went away together a short while later. At about 9 a.m. Peter Perera who was in his house heard a cry of pain from the direction of the footpath and presently the deceased ran into his compound in blood-stained clothes and fell there. Peter asked him what had happened to him and in reply to Peter's questions he said that he had been stabbed with a knife by his friend and that it was Lewis who stabbed him. He also stated to a neighbour of Peter's named Anthony, who too came up and asked him "who had done this to him", that it was Lewis who had stabbed him. Anthony went to the village headman's house and informed him of the stabbing. A police constable, who happened to come there when Anthony's statement was being recorded by the headman noted that the time was 9-45 a.m. by his watch. Having recorded Anthony's statement the headman went to Peter's house with the constable. They found the deceased still lying on Peter's compound, at the end of a trail of blood that started from the footpath, and they had him taken to the General Hospital in Colombo. He was admitted to the hospital at 11-11 a.m. and he made a statement on affirmation to an unofficial magistrate at 1-15 p.m. Meanwhile the police had arrested the appellant at 1 p.m. at a bakery at Hunupitiya. The deceased died at 4 a.m. on the next day. He had received seven stab wounds, of which three were on the front and one on the back of the chest, and the rest were on the front of the left shoulder, on the palm of the left hand penetrating it from front to back, and the back of the right elbow. The four stabs on the chest had injured the pericardium and the right auricle, the left lung in two places, and the right lung.

Though this evidence was not contested, the defence did dispute the truth of some further evidence given by Anthony, the effect of which was that he had seen the appellant stab the deceased, and also the truth of the statements made by the deceased himself. No evidence was called for the defence, but the appellant stated from the dock that he "knew nothing about the stabbing."

The learned Judge directed the jury to the effect that if they could not accept Anthony's evidence in full they had to consider whether they could act upon the statements made by the deceased. It was contended for the appellant that the learned Judge "failed to caution the jury adequately upon the danger of acting on the uncorroborated deposition of the deceased", and that the failure to do so amounted to a misdirection. This ground of appeal was originally formulated as a ground of law, but learned Counsel for the appellant agreed at the hearing that the alleged misdirection did not involve "a wrong decision of any question of law." It follows that the appeal can succeed on this ground only if it has been shown that there has been a miscarriage of justice.

The deposition in question was in the following terms :—

> "Lewis Fernando stabbed me with a kris knife. I was stabbed several times. I think about 9 times. He demanded money from me. I refused to give him. He wanted money as

"kappan". I did not owe him any money. The stabbing took place near a jungle. Lewis wanted a letter delivered to him. I went home to fetch it. Whilst returning he attacked me with a kris knife. No one saw the stabbing. For my cries people from the neighbouring houses came up. They saw the man running away."

It is apparent from the facts that are not in dispute that the deceased was in a position to observe whether it was the appellant or someone else who stabbed him : he was stabbed in broad daylight when he was out in the open, and five of the seven wounds were inflicted on the front of the body. According to the prosecution, the deceased and the appellant were on friendly terms with each other up to that day, and the cross-examination of the prosecution witnesses suggests that that fact is common ground. It is therefore improbable that the deceased would have made an accusation against the appellant which he knew to be false. According to the evidence of Peter Perera, who was cross-examined only as to whether he knew "how the quarrel started between the accused and the deceased", it was immediately after he was stabbed that the deceased declared that it was his friend Lewis who stabbed him. To the Magistrate the deceased stated further that Lewis stabbed him when he was returning from his house where he had gone to fetch a letter that Lewis had wanted to be delivered to him. The facts that the appellant had made such a request, that the deceased went home that morning as stated by him, that he had set out from home on his return journey a short time before he was stabbed, and that the appellant was in his company then have been proved by other evidence. It seems to us that there was ample corroboration of the deceased's deposition.

In his summing up the learned Judge, having discussed the evidence of Anthony and the conclusion that would flow from an acceptance of it, directed the jury as follows :—

"If on the other hand you feel that you cannot accept Anthony's evidence in full and if you feel some reasonable doubt as to whether Anthony saw all that he says he saw, you then come to what you call the dying declaration and to certain other circumstances which I should wish to mention to you.

Now, Gentlemen, with regard to dying declarations they are admissible evidence, but of course naturally when you are dealing with statements by a person who is not before you, you will bear in mind that they cannot be tested in the way that other evidence is tested by cross-examination, and it is for that reason that juries in practice are warned to be cautious in dealing with dying declarations, but that by no means implies that you should reject it. It merely means that you should consider in your mind very carefully any alternative possibilities if there are any alternative possibilities, that may present themselves to you, but it by no means implies that you must decline to act on it, provided you approach it with caution bearing in mind, as I say, the fact that it is unable to be tested in the way that other evidence can be tested."

He then read to them the deposition and discussed at length the evidence of what he referred to as "corroborative factors." Finally, on the question of the identity of the deceased's assailant, he said :—

"It is purely a question as to what value you are prepared to attach to Anthony's evidence, which if you accept in full makes your task easy. If you do not accept that evidence in full but think that he merely arrived at the scene after the stabbing, then you are thrown back upon the dying declaration, and the fact of course that when Anthony asked this man who stabbed him he said that it was Lewis who stabbed, and the fact for what it is worth that Lewis and this man were together a short time before this episode, and that they left the house of the sister Emmie Nona a short time before. We do not know exactly what time it was but it was half an hour or so before this episode."

The question as to the direction that should be given to a jury about the evidentiary value of a statement admitted under section 32 (1) of the Evidence Ordinance was considered by this Court in the case of *R. vs. Asirvadan Nadar* (1950) 51 N. L. R. 322. It was held that where in a trial for murder statements contained in a deposition made by the deceased formed to a very large extent the foundation of the case against the accused it was imperative that the jury should have been adequately cautioned that they should appreciate that the statements of the deponent had not been tested by cross-examination ; and that while there is no rule of law requiring corroboration of such evidence, the jury should always be cautioned as to the inherent weakness of this form of hearsay and their attention ought specifically to be drawn to the question of the extent to which the deposition is corroborated or contradicted by other facts and surrounding circumstances proved in evidence. Mr. Pullenayagam relied on this decision and also invited us to adopt the following dictum of Beaumont, C.J. in the case of

Emperor vs. Akbarali Karimbhai A. I. R. (1933) Bom. 479 at 481 decided by the Bombay High Court :—

> " Generally speaking, and as a rule of prudence, I am of opinion that a declaration relevant under section 32 (*sc.* of the Evidence Act), but not made by one in immediate expectation of death, and not made in the presence of the accused, ought not to be acted upon unless there is some reliable corroboration."

At the same time, however, he very properly brought to our notice a judgment of Leach, C.J. in a Madras case, *In re Guruswami Tevar* A. I. R. (1940) Madras 196 at 200. 41 Criminal Law Journal of India at p. 437 dissenting from this view. We respectfully agree with the view taken in the Madras case ; but even if the other were the better opinion we do not think it was necessary in the circumstances of the present case that the jury should have been advised that they ought not to act on the deceased's statement unless there was some reliable corroboration, for there was such corroboration furnished by facts that were not in dispute. The jury were adequately cautioned as regards the inherent weakness of evidence of this kind and we are unable to agree that there was a misdirection on this point.

The other ground of appeal that was argued is :—

> " That the comment of the learned trial Judge on the failure of the accused to give evidence constituted in the particular circumstances of the case a misdirection in law."

The comment was made in a discussion of the exceptions that would arise for the jury's consideration if they were satisfied that it was the appellant who caused the deceased's death and that he did so by an act done with a murderous intention. The learned Judge directed the jury that it was open to them to consider the exception of sudden fight and that of grave and sudden provocation ; and he pointed out that the evidence was that the two men had been friends for some time and there was no evidence that there was anything but friendliness between them, except for the deceased's statement that the appellant had wanted some money from him ; but he also observed that the appellant himself had not given evidence, although, in view of the nature of the prosecution case, it would not have been difficult for him to have given them " an account of a sudden fight or of some grave and sudden provocation which caused him to lose his power of self control and stab his friend."

Counsel for the appellant contended that this comment might well have led the jury to the erroneous view that from the fact that the appellant did not give evidence they could infer that he was the deceased's assailant. We do not agree. In the first place, the comment was made in reference to a question in respect of which the burden of proof lay on the defence, namely, whether there were circumstances that brought the case within an exception, and the jury had already been directed that that question would arise only if they were satisfied that the deceased's assailant was the appellant. Secondly, the jury had been expressly directed not only that on the issue as to the identity of the assailant the burden of proof was on the prosecution but also that the fact that the appellant did not give evidence did not help the prosecution to discharge that burden. The learned Judge said in his summing-up :—

> " But on this question whether or not you are satisfied that it was the hand of Lewis that inflicted the injuries you will remember that in the absence of an explanation the absence of a denial in spite of the plea of not guilty, does not help the prosecution case. If you are not satisfied by the prosecution evidence—I hope I am making the position clear—on this question of whose hand it was, quite apart from what the defence says or does not say, you must be satisfied beyond reasonable doubt before you come to the conclusion that it was the hand of Lewis that inflicted these injuries."

The appeal is dismissed.

Appeal dismissed.

THE COURT OF CRIMINAL APPEAL

Present : GUNASEKARA, J., PULLE, J. & SWAN, J.

REX vs. V. THURAISAMY

Appeal 51 of 1952 with Application 81 of 1952

S. C. 11—*M. C. Manaar* 13646

Argued and Decided on : 23rd September, 1952
Reasons : 15th October, 1952

Court of Criminal Appeal—Murder—Evidence led in rebuttal by the Crown after close of prosecution case—Such evidence available to the Crown before close of case—Evidence allowed in the interest of justice and to impeach credibility of accused—Was it proper—Judge's exercise of discretion under section 237 (1) *Criminal Procedure Code—Principles governing it—Burden of proof where accident is pleaded—Section* 73, *Penal Code.*

In a charge of murder by shooting with a gun the presiding Judge allowed the Crown to lead in rebuttal evidence of facts constituting a motive for the alleged murder after the prosecution had closed its case and the accused had given evidence. This was done for the purpose of impeaching the credibility of the accused and in the interest of justice. The evidence led in rebuttal was available to the Crown before it closed its case.

The presiding Judge also in referring to the appellant's evidence that the gun was discharged accidently told the jury that the burden was on the accused to satisfy them. that the accused's version was probably true.

Held : (1) That there has been a miscarriage of justice resulting from a wrong exercise of discretion by the presiding Judge to allow the prosecution to call in evidence in rebuttal.

(2) That the prosecution should not have been permitted to adduce at that stage evidence which, if it was admissible at all, could have been adduced before the appellant entered upon his defence ; for the prosecution was thereby enabled to withhold until after the close of the case for the defence an important part of its own case, consisting of the whole of the evidence of a motive and a part of the evidence of the preparation for the commission of the offence charged.

(3) That the onus was on the prosecution to prove beyond reasonable doubt that the firing of the gun was not accidental and the appellant would have been entitled to an acquittal even if it was not proved that the injury was the result of an accident but there was a reasonable doubt on that point.

Per GUNASEKARA, J.—It has been observed more than once, as was said by Abrahams, C.J., in *Vandendriesen vs. Houwa Umma*, (1937) 39 N. L. R. 65 at 66 " that evidence for the prosecution should not be taken after the case for the prosecution has been closed, when such evidence will have the effect either of filling in a gap left in the evidence or resolving some doubt in favour of the prosecution ". Evidence in rebuttal should be permitted only in a case where a matter has arisen *ex improviso R. vs. Charles* (1941) 42 N. L. R. 409 or the evidence was not admissible before the prosecution case was closed *R. vs. Ahamadu Ismail* (1940) 42 N. L. R. 297.

Cases referred to : *Vandendriesen vs. Houwa Umma* (1937) 39 N. L. R. 65 at 66.
R. vs. Charles (1941) 42 N. L. R. 409.
R. vs. Ahamadu Ismail (1940) 42 N. L. R. 297.
R. vs. Dionis (1951) 52 N. L. R. 547.

V. S. A. Pullenayagam, for the appellant.

J. G. T. Weeraratne, Crown Counsel, for the respondent.

GUNASEKARA, J,

At the close of the argument in this case we quashed the conviction of the appellant and ordered a new trial, and we said that we would give our reasons later.

The appellant, a man of 27, was convicted of the murder of a young woman of 17 named Mariyai by shooting her. He was a servant in the employ of a land-owner named Soosapillai living in the village of Manalkoddai in Mannar. The deceased too lived in that village with her parents ; and a young man named Subramaniam, to whom she was engaged to be married, lived with them in the same house. At about 8 a.m., on the 20th March last when the deceased was in her garden she was fatally wounded by the discharge of a shotgun which belonged to Soosapillai's father Roche and was in the appellant's hands at the time. Hearing the report of the

gun and a cry of distress, Subramaniam ran up from a vegetable plot close by, and the appellant shot at him, wounding him on a leg, and ran away. At the trial the appellant gave evidence to the effect that the gun went off accidentally and wounded the deceased, and that he shot at Subramaniam in self-defence when the latter came at him with an uplifted mammoty. The main grounds of appeal relate to the admission in evidence of certain statements alleged to have been made by the appellant about his relations with the deceased and about a visit early that morning to Roche's house where Soosapillai was living, and to the presiding Judge's directions on the effect and bearing of that evidence and on the burden of proof.

The prosecution closed its case without adducing evidence of any facts constituting a motive for the alleged murder. For proof that the appellant shot the deceased intentionally it relied in part upon evidence to the effect that on the morning of that day, before the shooting, the appellant had taken the gun from Roche's bedroom in the absence of both Roche and Soosapillai from their house. This evidence was given by a woman named Sinnamma, of Pallimunai, who claimed to have been at Roche's house that morning. The appellant denied the truth of this evidence and said that on the contrary Soosapillai himself had given him the gun and three cartridges early that morning and ordered him to go to Soosapillai's fields and see if they had been damaged by cattle and elephants. In Cross-examination it was put to him by Crown Counsel that he had been on very friendly terms with the deceased, that she had promised to marry him, and that two weeks before her death he had asked her to marry him. He denied these suggestions, and also denied a further suggestion that on the 21st March he had made the statements in question to a police officer. After the close of the case for the defence the Crown Counsel, with the leave of the presiding Judge, called a police sergeant named Jayawardene to give evidence in rebuttal of this denial. This witness said that the appellant made a statement to him at 7-35 a.m., on the 21st March in the course of which he said :

"About 5 or 6 months ago I came into terms of intimacy with deceased Mariyai. She promised to come along with me. About two weeks ago I saw her passing my house and I questioned her whether she would keep to her promise and come along with me. I asked this from her because I learned that she is to be given in marriage to one Subramaniam who is staying in her house. She then told me not to speak of any marriage or intimacy with her. I became hurt and disappointed."

and that later in the statement the appellant also said :

"The following morning namely the 20th instant about 7 a.m., I went to the house of Soosapillai. He and his wife were not at home, there was only Pallimunai woman name not known to me."

The point is taken in the grounds of appeal that the admission of this evidence was obnoxious to the provision in section 25 (1) of the Evidence Ordinance (Cap. 11) that no confession made to a police officer shall be proved as against a person accused of any offence. Mr. Pullenayagam preferred however to base his case upon an argument that even otherwise the use that was made of the evidence resulted in a miscarriage of justice.

If the admission of these statements was obnoxious to section 25 (1) there can be no question that the conviction could not stand. If it was not, then it was open to the prosecution, under section 21, to prove them as admissions of relevant facts, and the question arises whether in view of this circumstance there was a proper exercise of the learned Judge's discretion when he granted the Crown Counsel leave to call a witness to prove them after the close of the case for the defence.

After the defence has closed its case the prosecuting Counsel may, in terms of section 237 (1) of the Criminal Procedure Code (Cap. 16), by leave of the Judge call witnesses in rebuttal. The principles upon which a Judge should exercise his discretion to grant or refuse such leave, or should of his own motion take any evidence after the close of the case for the prosecution, have been laid down in several cases. It has been observed more than once, as was said by Abrahams, C.J., in *Vandendriesen vs. Houwa Umma*, (1937) 39 N. L. R. 65 at 66 "that evidence for the prosecution should not be taken after the case for the prosecution has been closed, when such evidence will have the effect either of filling in a gap left in the evidence or resolving some doubt in favour of the prosecution." Evidence in rebuttal should be permitted only in a case where a matter has arisen *ex improviso R. vs. Charles* (1941) 42 N. L. R. 409 or the evidence was not admissible before the prosecution case was closed *R. vs. Ahamadu Ismail* (1940) 42 N. L. R. 297.

The ground upon which the prosecution was allowed to call a witness in rebuttal in the present case is stated in the learned Judge's order as follows :

"In the interests of justice the Court should allow this evidence to be led because the Court

must see that such evidence as is permissible is led which would promote the cause of justice in seeing that the guilty are punished and the innocent are acquitted."

It seems, however, to be manifestly unjust that the prosecution should have been permitted to adduce at that stage evidence which, if it was admissible at all, could have been adduced before the appellant entered upon his defence: for the prosecution was thereby enabled to withhold until after the close of the case for the defence an important part of its own case, consisting of the whole of the evidence of a motive and a part of the evidence of preparation for the commission of the offence charged. This aspect of the admissibility of the statements in question, as substantive evidence of relevant facts, appears to have escaped the attention of the learned Judge when he made this order, and he refers there only to a less important aspect of their admissibility, as evidence admissible under section 155 of the Ordinance to impeach the credit of the appellant as a witness. Had the true character of the statements been appreciated it would have been apparent that it was not possible to deprive them of their evidentiary value as admissions when they were used for the purpose of impeaching the appellant's credit as a witness. This is demonstrated by what the learned Judge himself has said in his summing up. He explained to the jury at an early stage that evidence of these statements "was allowed to be led because that evidence was sought to be led here in order *to impeach the credibility of the accused when he stated that he had nothing to do with that girl Mariyai*, who is the deceased in this case." He next referred to that evidence as having a bearing on the issue as to whether the appellant fired the gun intentionally:

> "Now how can you find out whether the accused did have a murderous intention or not when he fired this gun? If you accept the evidence for the prosecution that then it was *a deliberate act of shooting which the accused committed because of certain reasons which according to the case for the Crown the accused himself had stated to that Police Sergeant Jayawardene.*
>
> The accused denies that there is any ill-feeling between this woman Mariyai and himself. But this part of the accused's evidence the Crown sought to impeach by calling the evidence of Police Sergeant Jayawardene who stated that the accused told him that he has been loved by this girl Mariyai and Mariyai asked him not to have anything to do with her or talk to her. That evidence was led and allowed to be led because the Crown is entitled to do that. *The accused says there is no reason whatsoever and it was a sheer accident on his part.* In order that you may attach the proper weight to that evidence the Crown led the evidence of another witness Police Sergeant Jayawardene *to whom the accused had said something different* soon after his arrest.

There is in this passage a clear direction that there was evidence of an admission by the appellant of facts constituting a motive for the shooting. The same direction is contained in the next reference to this evidence where, in his discussion of the evidence given by Subramaniam, the learned Judge says:—

> "According to the prosecution he was regarded as a more suitable husband than the accused *who too wanted the girl to go with him and she refused.*"

The only evidence that the appellant wanted the girl to go with him and she refused is his admission. Finally, the learned Judge directed the jury that the exception of grave and sudden provocation had not been established; and what he said involved a direction that the appellant's statement to the Sergeant was evidence that the deceased had broken a promise of marriage:—

> "Another matter that may just occur to your mind is whether there was any provocation. *The only provocation is that the girl has jilted the accused.* If there was any provocation it must be both grave and sudden provocation. *If the girl had refused to marry the accused two weeks ago*, you cannot say it was a sudden provocation because the only kind of provocation that is known to us which has the effect of reducing what would otherwise be murder to culpable homicide not amounting to murder is grave and sudden provocation. There is no sudden provocation in this case."

In our opinion there has been a miscarriage of justice resulting from a wrong exercise of the presiding Judge's discretion to allow the prosecution to call evidence in rebuttal. The evidence in question, constituting as it did the only evidence of a motive for the alleged offence and corroboration of the evidence of preparation, may well have tipped the scale against the appellant, even if the jury did not infer from all the evidence adduced by the prosecution that he made a confession to the Police Sergeant.

We also agree with the contention that there has been a misdirection on the burden of proof. Although several passages in the summing-up contain a correct direction it seems to us that the jury may well have been misled by the language used in some of the references to the

appellant's evidence that the gun was discharged accidentally. The learned Judge said, for instance :—

> " According to section 73 of the Penal Code, a person in the position of an accused is not responsible for any injury caused to another *if it can be proved* that such injury was the result of an accident over which he had no control."

The appellant would have been entitled to an acquittal, however, even if it was not proved that the injury was the result of an accident but there was a reasonable doubt on that point. The question for the jury was not whether there were circumstances that brought the case within an exception but whether the prosecution had discharged the burden that lay on it to prove beyond reasonable doubt that the firing of the gun was not accidental. The learned Judge also said :—

> " On this question of intention there is a commonsense principle that is always called in by the prosecution in order to prove murderous intent on against any prisoner, that is every sane adult is presumed to intend the natural and probable consequences of his voluntary acts—mind you voluntary. *If you accept the evidence of the accused* that the gun went off involuntarily, then of course this principle will not apply."

Again he said, after he had discussed the case for the prosecution :—

> " As against this evidence we must consider the evidence of the accused. In the case of his evidence *he has got to satisfy you on a balance of probability that what he says is true* not beyond a reasonable doubt but on a balance of probability what the accused says is acceptable to you."

As in the case of *R. vs. Dionis* (1951) 52 N. L. R. 547 it was a misdirection to tell the jury that there was a burden on the appellant to satisfy them that his version was probably true.

Present : ROSE, C.J. & CHOKSY, A.J.

M. I. M. EGRIS vs. HAMID USEEN MARIKAR SEGI ISMAIL

S. C. No. 70 (*Inty.*)—*D. C. Colombo No.* 23656/*M*

Argued on : 10th December, 1951
Decided on : 14th December, 1951

Ceylon (*Constitution*) *Order in Council* 1946, *section* 14 (2)—*Action under, by common informer to recover penalty for sitting and voting in House of Representatives having reasonable grounds for knowing disqualification—Plaintiff's application to proceed with action—District Judge's discretion to allow or withhold—Proviso to sub-section* (2)—*When may Supreme Court interfere with such discretion.*

The District Judge, purporting to exercise discretion under the proviso to sub-section (2) of section 14 of the Ceylon (Constitution) Order in Council 1946 refused to give leave to the plaintiff, a common informer, to proceed with his action filed under section 14 (2) of the said Order in Council for recovering Rs. 83,000 by way of a penalty from the defendant for sitting and voting in the House of Representatives, having reasonable grounds for knowing that he was disqualified from doing so.

This refusal was based on the ground that a similar action on the same facts, covering a different period of time brought by another plaintiff in the same Court had been dismissed earlier for want of appearance.

Held : That the public interest requires that actions of this nature should have the opportunity of being decided on their merits, and as the earlier action was dismissed without a consideration of the merits, the learned District Judge should have granted leave to the plaintiff to proceed with the action.

H. W. Jayawardene, for the plaintiff-appellant.
M. H. A. Aziz, for the defendant-respondent.

ROSE, C.J.

The plaintiff-appellant, a common informer, filed an action under section 14 (2) of the Ceylon (Constitution) Order in Council, 1946, in the District Court of Colombo for the recovery of a sum of Rs. 83,000 by way of penalty from the defendant-respondent on the ground that the said defendant-respondent having reasonable grounds for knowing that he was disqualified from sitting and voting as a member of the House of Representatives had continued to do

so on the several dates set out in the schedule to the plaint.

The learned District Judge, purporting to act under the proviso to sub-section 2 of section 14 of the said Order in Council, refused to give him leave to the action being further continued.

It appears that a similar action on the same facts, but covering in part a different period of time, had previously been brought by another plaintiff in the same Court. This action was dismissed for want of appearance and it was, therefore, unnecessary for the merits of the action to be gone into.

It was the circumstance of this earlier action having been thus dismissed that led the learned District Judge to refuse his leave for the plaintiff in the present matter to proceed further with this action.

The District Judge, of course, has a discretion in deciding whether or not to withold his leave under the aforesaid proviso, but if he exercises that discretion for reasons which appear to this Court as unsound, then, in my opinion, it is our duty to intervene.

It seems to me that the public tierest in a matter of this type must take precedence over the private convenience of a member of Parliament, and that the public interest requires that actions of this sort should have the opportunity of being decided on their merits. Had the earlier action being dismissed after a consideration of the merits, then, no doubt, the position would have been different, but as the matter has not yet been considered from that aspect by a Court of Law, I consider that the learned District Judge erred in witholding his leave from the plaintiff.

That being so, the appeal is allowed, the order of the learned District Judge is set aside, and the matter is remitted to the District Court to enable the necessary leave to be granted. The appellant will have the costs of this appeal in any event.

Choksy, A.J.
I agree.

Appeal allowed.

Privy Council Appeal No. 36 of 1951

THE GAMINI BUS COMPANY LIMITED vs. THE COMMISSIONER OF INCOME TAX, COLOMBO

FROM

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 29TH JULY, 1952

Present : Viscount Simon, Lord Normand, Lord Oaksey, Lord Reid and Sir Lionel Leach

Privy Council—Income Tax—Appellant Company's returns rejected and differently assessed by Income Tax Authorities—Assessment based on data available to the authorities—Objection to assessment as being arbitrary and violating secrecy under section 4 (1) *of Income Tax—Authorities powers to assess —Scope of—Income Tax Ordinance* (*Chapter* 188)—*Sections* 69, 64, (2) 70, 71, 73 (4) 86 (2).

The appellant, a bus company, submitted returns of Income Tax for 4 years, which the assessor rejected and assessed at substantially larger sums, as the margin of profits according to the tendered accounts was smaller than they should have been according to the assessor. The Commissioner reduced the assessments of the assessor, and in so doing the Commissioner relied upon data which supported the view that the profits of a bus company in the area the appellant was operating bore a fairly constant rate to the company's expenditure on oil and petrol. The data contained in a document R 14 related to the expenditure of seven other bus companies, whose names were not given and were extracted from files in the Income Tax Department, which were not available for inspection by the appellant.

The Commissioner's assessment was confirmed by the Board of Review and by the Supreme Court.

It was contended by the appellant that (*a*) that there was no evidence or material on which the Board could justifiably reject the appellant's accounts ; (*b*) that the document R 14 was wrongly admitted at the hearing by the Commissioner of Income Tax, and that the document infringed the duty of secrecy enjoined under section 4 (1) of the Income Tax and consequently invalidated the Commissioner's assessment ; (*c*) that the Commissioner in making his order did act on material which was not properly in evidence at the hearing of the Appeal by him.

Held : (1) That the Income Tax authorities had the power under the Ordinance to reject the appellant's returns and substitute their estimates of the assessable income and that it was not necessary for them to give reasons for so doing.

(2) That before the Board of Review the onus was on the appellant to disprove the correctness of the estimates and to establish some lower figure, which the appellant had failed to do.

(3) That the reliance on the data contained in document R 14 as showing a ratio between net profit and expenditure on oil and petrol was legitimate for the purpose of calculating the appellants' proper assessment and did not infringe the principles of fair play and natural justice.

(4) That the reception of document R 14 did not violate section 4 (1) of the Income Tax as it contained no name except that of the appellant and the data contained thereon were extracted anonymously, and that it was unnecessary to decide whether, if it was infringed, this would in itself invalidate the assessment.

Per VISCOUNT SIMON.—" Their Lordships cannot conclude this part of their judgment without emphasising in the plainest terms that it would be wholly improper to justify the rejection of the appellant's accounts and the substitution of a higher figure of assessment merely because, in the case of other tax-payers in the same line of business, the conclusion has been reached that their accounts were not accurately kept, and that their returns required to be rejected. Each tax-payer is entitled to have his assessment fixed, if his own return is not accepted, at a figure which the taxing authorities honestly believe to be proper in his individual case, and no argument that in this class of business the figure of return is habitually under stated can be used to prove that this happened in his case also ".

Delivered by VISCOUNT SIMON

This is an appeal from a judgment of the Supreme Court of Ceylon, dated the 18th July, 1950, on a Case Stated by the Board of Review under Section 74 of the Ceylon Income Tax Ordinance. By that judgment the Supreme Court (Dias, S.P.J., and Swan, J.) confirmed the decision of the Board of Review dated 25th May, 1949, whereby the Board upheld four assessments made on the appellant company by the Commissioner of Income Tax. As originally drawn up, the Board in the Case Stated indicated its doubt whether any question of law really arose, but an interim Order of the Supreme Court directed the following questions to be embodied in the Case Stated, so that the Supreme Court could adjudicate upon them :

(*a*) Was there evidence or material on which the Board could reject the appellant company's accounts, and was the Board justified in rejecting them ?

(*b*) Was a document marked R14 wrongly admitted in evidence at the hearing of the Appeal by the Commissioner of Income Tax ?

(*c*) In making his Order did the Commissioner of Income Tax act on material which was not properly in evidence at the hearing of the Appeal by him ?

The first of these questions is easily disposed of. The Assessor had before him a return of income made by the appellant company for each of the four years 1943-44, 1944-45, 1945-46, and 1946-47, and accounts furnished by the appellant company were tendered in support of these returns. By Section 64 (2) of the Ordinance, the Assessor might either (*a*) accept the returns and make assessments on that basis, or (*b*) if he did not accept the returns, himself estimate the amounts of the assessable income of the appellant company and assess accordingly. The Assessor did not accept the returns made by the appellant company and estimated the amount of assessable income of the appellant company in each of the four years at substantially larger sums. He was, of course, perfectly entitled to do this according to the best of his judgment and it was not necessary for him to give his reasons for rejecting the appellant's returns or for arriving at his own estimates. It appears, however, from the documents before their Lordships, that the company's returns were rejected for two main reasons. The tendered accounts professed to show that, in the first six weeks of the company's 'bus services, it made a profit of about 2,270 rupees a week, which is equivalent to 118,000 rupees per annum. Yet in the accounts tendered for subsequent periods, each extending over a year or a little less, the rate of profit only worked out at the rate of something like one-third or even only a quarter of this per week, although conditions in these later periods were considered to be very favourable to such a company. The second main reason given for rejecting the appellant company's accounts was that carbon-copies of the ticket-books were missing and without these it was considered that the Way Bills could not be adequately checked.

Whether these reasons were in fact adequate or inadequate is quite immaterial if the Assessor honestly came to the conclusion that he should not accept the company's returns, but should substitute estimates of his own. Indeed, when the company appealed to the Commissioner under Section 69, it was conceded that the case was one for estimated assessments, though it was urged that the gross receipts as shown in the accounts should be treated as the starting point from which these assessments might be arrived

at by proper deductions. The Commissioner was not prepared to reach revised figures by accepting from the company's accounts the gross receipts as shown therein and Mr. Grant was bound to admit that he was free to arrive at his own estimates of higher income independently of the accounts. The Ordinance, by Section 69, confers on a person aggrieved by the Assessor's estimate the right to carry the matter to the Commissioner and to call on him to "review and revise" such assessment. This process is described as an appeal and by subsection (6) in disposing of the appeal the Commissioner may "confirm, reduce, increase, or annul the assessment". From the determination of the Commissioner there is provided, by Sections 70 and 71 of the Ordinance, an appeal to the Board of Review, and by Section 73 (4) the onus of proving that the assessment as determined by the Commissioner is excessive rests on the appellant.

In the present case, the determination of the Commissioner was that the assessment made for the year 1943-44 should be confirmed, but that the subsequent assessments should be somewhat reduced, though the revised figures were still largely in excess of what the company had put forward. On appeal, the Board of Review confirmed the Commissioner's decision. The Commissioner's determination is an elaborate document setting out his reasons and shows that the Assessor as well as the appellant company's advocate attended and put forward arguments. One of the documents which the Assessor produced was a statement marked R14, the admission and use of which are impeached in the second and third questions raised in the Case Stated. It is this document which raises the main point of difficulty.

The assessments arrived at by the Commissioner and confirmed by the Board of Review appear to have been reached, at any rate in part, upon the view that the profits of a 'bus company in this area bear a fairly constant ratio to the company's expenditure on petrol and oil. Since the amount of the appellant's expenditure on these supplies is recorded, this would enable the approximate profit to be arrived at. The view that such a ratio exists in the case of such 'bus companies and may be taken as a guide to proper assessments is a view which the Assessor and the Commissioner of Income Tax are entitled to hold and to apply, according to their judgment. In R14 the expenditure of seven other 'bus companies on petrol and oil was set out and the net profit upon which these companies were assessed was also tabulated so as to show an average ratio of profits to this expenditure in the ratio of 1·51 for 1943-44, of ·86 for 1944-45, and of 1·74 for 1945-46. The names of the other 'bus companies were not given and the figures were extracted from files in the Income Tax Department. In the course of the argument for the appellant, three objections were taken to the production and use of this document.

(1) It was contended that the production of R14 was a breach of Section 4 (1) of the Income Tax Ordinance, which provides as follows :—

> "Except in the performance of his duties under this Ordinance, every person who has been appointed under or who is or has been employed in carrying out or assisting any person to carry out the provisions of this Ordinance, shall preserve and aid in preserving secrecy with regard to all matters relating to the affairs of any person which may come to his knowledge in the performance of his duties under this Ordinance, and shall not communicate any such matter to any person other than the person to whom such matter relates or his authorised representative, nor suffer or permit any person to have access to any records in the possession, custody or control of the Commissioner."

On this, it is to be observed that Section 4 is to be read with Section 86 (2), which provides severe penalties to be imposed by a magistrate for the offence. The Section lays down a very necessary rule of conduct to be observed by the officials concerned, since it is of the highest importance that the affairs of an individual and identifiable income-tax payer should not be disclosed, in breach of Section 4, to anyone outside. Section 4 is not primarily a rule of evidence, though it would be very improper to disregard it when putting forward a document like R14. But R14 does not necessarily make a disclosure of "the affairs of any person" within the meaning of the section, for it contains no name except that of the appellant company, and the other entries are extracted anonymously from numbered official files. Their Lordships would strongly deprecate the production or use of such a document if it did in effect disclose information about other identified or identifiable taxpayers, but it is obvious that the document was prepared and produced not for this purpose but to help to show that the ratio above referred to between net profits as assessed and the cost of petrol and oil was a fairly constant ratio in many cases, and that in using the suggested ratio as a test the Assessor, and the Commissioner after him, were not acting capriciously or at random. Mr. Grant admitted that the ratio might properly have been supported by a document containing total figures so that under this head the objection is to details which make up the totals and which need not have been included at all. Their Lordships do not consider that Section 4 was infringed and this renders it unnecessary to

decide whether, if it was infringed, this would in itself invalidate the assessment.

(2) It is next, said that even if the first objection fails, it was unfair to make any use of R14 since the appellants could not be given an opportunity of examining the files from which the figures of other 'bus companies were extracted, or of ascertaining which companies they were. This, indeed, is the ground on which R14 is attacked in the Notice of Appeal to the Board of Review against the decision of the Commissioner. The answer appears to be that the company could have no complaint if the taxing authorities had asserted and applied the alleged ratio without giving these details, and that the appellants can hardly be treated as suffering an injury because more detailed figures were not withheld. Their Lordships agree with the Supreme Court in thinking that the figures given in R14 as going to illustrate and confirm the ratio were not improperly put before the Commissioner or the Board of Review and that there was no breach of the principles of fair play and natural justice in putting them forward. It is true that the figures of net profit in R14 are the figures at which the various 'bus companies were assessed to taxation and in most cases are very different from the figures in their own income tax returns. But this comment only goes to the weight to be attached to the resulting ratio and does not destroy the whole effect of the contention that the ratio is supported by experience in other instances.

(3) The third objection only emerged late in the argument before the Judicial Committee. R14 also contains figures, in the case of these other 'bus companies, which show that in the view of the income-tax authorities nearly all of them understated the profit they had made. If there was reason to think that the effective argument based on R14 was that, as other 'bus companies had made false returns, the appellant company had done so also, their Lordships would have no hesitation in declaring that such an argument is wholly inadmissible and that a document put forward to support it is open to the gravest objection. The contention that this was the use made of R14 receives, at first sight, some support from the document drawn up by the Commissioner in which he attributes to the Assessor the argument that gross receipts are "generally understated" in the case of 'bus companies. But this appears to be intended only as a retort to the argument on behalf of the appellant urging that the gross receipts as shown in the company's accounts should be accepted. The Commissioner uses R14 only to confirm the ratio put forward. The Supreme Court approaches the matter in the same way. Although there are columns in R14 which might lend themselves to be used to support an illegitimate argument, the grounds on which the decision was based do not appear to involve any misuse of these figures. Those grounds were that the income-tax authorities were entitled to reject the return made by the company and to substitute their own higher estimate of profits; that before the Board of Review the burden lay upon the appellant to disprove the correctness of this estimate and to establish some lower figure; that reliance on a ratio between net profit and the expenditure on petrol and oil was legitimate; and that R14 showed that there were solid grounds for accepting such a ratio in calculating the appellant's proper assessment.

Their Lordships cannot conclude this part of their judgment without emphasising in the plainest terms that it would be wholly improper to justify the rejection of the appellant's accounts and the substitution of a higher figure of assessment merely because, in the case of other tax-payers in the same line of business, the conclusion has been reached that their accounts were not accurately kept, and that their returns required to be rejected. Each tax-payer is entitled to have his assessment fixed, if his own return is not accepted, at a figure which the taxing authorities honestly believe to be proper in his individual case, and no argument that in this class of business the figure of return is habitually understated can be used to prove that this happened in his case also.

Objection was also taken by the appellant to a document marked R12 which was produced by the Assessor before the Commissioner and is referred to in the latter's Determination. R12 contains figures used in the computation of profits of another (but unidentified) 'bus company for the year 1947-48, and is apparently intended to reinforce the argument that a figure of gross takings derived from Way Bills requires to be checked by Ticket Books. Be that as it may their Lordships do not consider that R12 or any other document criticised affords adequate ground for the appellant's objection.

Their Lordships are therefore in agreement with the Supreme Court and will humbly advise Her Majesty that the appeal should be dismissed.

The appellant must bear the costs.

Appeal dismissed.

END OF VOLUME XLVII.